TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 648

DOMENICO DUMBRA AND FORTUNATO CHIAPPARONE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Pet. for

FILED JULY 16, 1924

(30,611)

Dumbra v. U.S. Apr. 13

(30,511)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 546

DOMENICO DUMBRA AND FORTUNATO CHIAPPARONE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1924

Writ of Error.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.
TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York, GREETING:

Because in the records and proceedings, and also in the rendition of an order denying the application of Domenico Dumbra and Fortunato Chiapparone to quash a certain search warrant issued at the instance of the United States of America, and for the return of 50 barrels of wine seized under said warrant, in a proceeding which is in the said District Court, before you, a manifest error has happened to the great damage of the said Domenico Dumbra and Fortunato Chiapparone as by their complaint appears; we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if such order be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 25th day of July next, in the said Supreme Court, to be then and there held, with the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and ac-

cording to the laws and customs of the United States, should be done.

WITNESS the Hon. William H. Taft, Chief Justice of the United States, the 25th day of June, in the year of our Lord, one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

ALEXANDER GILCHRIST,
Clerk of the District Court of the United States for the Southern Dis-
5 trict of New York.

Allowed by:
JOHN C. KNOX,
U. S. District Judge.

(Indorsed; filed June 7, 1924).

Search Warrant.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To JAMES J. BIGGINS,

6 An agent and employe of the United States, appointed by and acting under the authority of the United States Treasury Department and charged with the duty of enforcing the Act of October 28, 1919, known as the National Prohibition Act.

Whereas, it appears from the affidavit of Joseph Smith, that certain intoxicating liquors containing more than ½ of 1 per cent. of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain winery known

as D. Dumbra & Co. located on the first floor and basement of the building located at 512 E. 16th St., and the grocery store adjoining said building, located at 514 East 16th St., Borough of Manhattan, City and Southern District of New York, and in any closet, vault, cellar, sub-cellar, room or rooms connected with or used in connection with said winery or said grocery store, and that said liquor is used and is intended for use and has been used in violating Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises, 8

Now, therefore, you are hereby commanded in the name of the President of the United States, in the day time only to enter the said premises, and then and there to search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same, and all records used in connection therewith, and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event that you seize or take said liquors under the warrant, to give a copy of this warrant, together with a 9 receipt for the liquor taken (specifying it in detail) to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this warrant with the receipt as aforesaid, in the place where said liquor is found.

Immediate upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to deliver to him

10 Affidavit for Search Warrant.

a written inventory of the liquor taken, duly made and verified by you.

Given under my hand this 15th day of February, 1924.

JOHN C. KNOX,
United States District Judge for the
Southern District of New York.

(Indorsed; filed February 20, 1924).

Affidavit for Search Warrant.

11 Approved:

ELMER H. LEMON,
Special Assistant U. S. Attorney.

Before Honorable JOHN C. KNOX, United States District Judge Southern District of New York.

In the Matter *of* The application for a Search Warrant Affecting the Premises D. DUMBRA AND Co., located on the first floor and basement of the building at 512 E. 16th St.; and 12 the grocery store located in the building at 514 E. 16th St., Borough of Manhattan, City and Southern District of New York.	Affidavit for Search Warrant Violation of The National Prohibition Act.

SOUTHERN DISTRICT OF NEW YORK, ss.:

JOSEPH SMITH, being duly sworn, deposes and says:

I am an employee of the Treasury Department of the United States.

Affidavit for Search Warrant.

On February 12, 1924, at about 4.00 P. M., accompanied by other agents, I went to the store located in the building at 514 East 16th St., Borough of Manhattan, City and Southern District of New York. This store adjoins a winery conducted by D. Dumbra and Co., which winery is located in the building at 512 E. 16th St., Borough of Manhattan, City and Southern District of New York. In the grocery store I saw Mrs. Dumbra and her son. I said to him that I wanted a gallon of port wine, and another agent with me said he wanted a gallon of sherry wine. The son stated that the price of sherry is $6 a gallon, and the price of port, $5 a gallon. He then went to the back of the grocery store, behind the partition, and turned to the right toward the winery, which is in the adjoining building. In a short time he came back with two gallons of wine and wrapped them up separately in paper bags. The agent with me then paid Mrs. Dumbra $11 for the two gallons of wine. We brought the wine away from the premises, and tasted of the same, I am familiar with the taste of intoxicating liquor and I know that said wine contained more than ½ of 1% of alcohol by volume. As we left the grocery store, the son of Dumbra came out the front door of the grocery, and entered the front door of the winery.

Several days ago I went to said grocery store where I saw the same son, who sold me wine as above set forth, and I stated to him that I wanted a gallon of port wine. The son asked me if "Burnsie" sent me. I said yes, and he then said alright. He told me to wait and he would go get the wine for me. He then went in the back of the store and

turned toward the winery, after telling me to wait outside. I went out on the street and in a short time he came out of the front door of the wine store at 512 E. 16th Street, with a gallon of wine wrapped up in a paper bag, and delivered it to me on the street. I paid him $5 for the wine in the store before he told me to wait for him outside. I tasted of the wine and know that it was intoxicating. At no time did I present any papers or authority whatever for the buying of wine for sacramental or religious purposes, and from my in-
17 vestigation and purchases made by other agents of said premises, I know that wine is being sold from the grocery store at 514 East 16th Street, and that the source of supply is the winery located at 512 East 16th Street.

The said premises are within the Southern District of New York, and upon information and belief have thereon a quantity of intoxicating liquor containing more than ½ of 1% of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of a Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search war-
18 rant to search said winery known as D. Dumbra and Co. located on the first floor and basement of the building located at 512 E. 16th St., and the grocery store adjoining said building, located at 514 East 16th St., Borough of Manhattan, City and Southern District of New York, and in any closet, vault, cellar, sub-cellar, room or rooms connected with or used in connection with said winery

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or said grocery store and to seize all intoxicating liquors found therein.

JOSEPH SMITH.

Sworn to before me this 15th
day of February, 1924.

JOHN C. KNOX,
United States District Judge.

(Indorsed; filed February 20, 1924).

Return on Search Warrant. 20

NEW YORK CITY, February 18, 1924.

On February 15, 1924, seized from 514 E. 16th Street, New York City, N. Y., seventy-four bottles of wine including gallons, half gallons and quarts, 512 E. 16th Street, New York City, N. Y., fifty barrels of wine of a large quantity of wine in barrels and bottles on the premises. The removal of this wine was stopped by an order to show cause issued by the Hon. Judge Goddard. I, James J. Biggins, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant and that 21 I gave a copy of the warrant, together with a receipt for the property taken, to the person from whom it was taken or in whose possession it was found.

JAMES J. BIGGINS.

Sworn to before me this
18th day of February, 1924.

JOHN C. KNOX,
U. S. District Judge.

(Indorsed; filed February 20, 1924).

22 Notice of Motion.

Notice of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash search warrant
23 affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant.

Please take notice that on the petition of the applicants named above verified this day, permit and copy of search warrant referred to therein (copy of), the affidavit of John Peters, verified February 23, 1924 (the original of which is al
24 ready filed), a motion will be made before Hon. John C. Knox, one of the Judges of this Court, at Room 401, Federal Building, Borough of Manhattan, City of New York, N. Y., on the 29th day of February, 1924, at 10:30 o'clock A. M., on that day or as soon thereafter as counsel may be heard, for an order quashing the search warrant affecting premises No. 512 East 16th Street, in said Borough and City, issued by Honorable John C. Knox, February 15, 1924, so far as such search warrant affects said premises, and why 50 barrels

of wine seized thereunder should not be returned, and why the applicants should not have such other and further relief as may be just and proper in the premises on the following grounds:

1. That the said search warrant violates the rights of the said petitioners under the fourth amendment to the Constitution of the United States.

2. That the said search warrant was granted without probable cause for believing the existence of the grounds on which it was granted, so far as it affects said premises No. 512 East 16th Street, New York City.

3. That James J. Biggins to whom said warrant is directed is not one of the persons who are authorized by law to execute the search warrant.

Dated, February 27, 1924.

CHARLES F. MURPHY,
Attorney for Petitioners,
Office & P. O. Address,
141 Broadway,
Borough of Manhattan,
New York City.

To HON. WILLIAM HAYWARD,
United States Attorney.

ROMAINE Q. MERRICK, Esq.

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Petition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash search warrant affecting premises 512
29 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant.

Now come Domenico Dumbra and Fortunato Chiapparone and state:

1. That they are citizens of the United States and State of New York and reside in the Borough
30 of Manhattan in said city.

2. That at the times hereinafter stated they were and are co-partners under the firm name and style of D. Dumbra & Company, and engaged in conducting a winery at the premises known as No. 512 East 16th Street, in said Borough and City.

3. That in the afternoon of February 15, 1924, several certain persons who were and are un-

known to your petitioners but were, as your petitioners are informed and believe, one James J. Biggins and several agents under him, or under Romaine Q. Merrick, hereinafter mentioned, the said James J. Biggins, as they are informed and believe, being an agent and employee of the United States, appointed by and acting under the authority of the United States Treasury Department and charged with the duty of enforcing the act of Congress of October 28, 1919, known as the National Prohibition Law, entered upon the said premises occupied by your petitioners at No. 512 East 16th Street, aforesaid, and took and removed therefrom fifty barrels of wine, and fifty barrels in which said wine was contained.

4. That the said wine and barrels were so seized by virtue of a search warrant, a copy of which was delivered to your petitioner Domenico Dumbra and a copy of the same is hereto annexed and marked Exhibit "A" and that there was no other authorization for the seizure of said wine and barrels.

5. That the taking of wine from said premises belonging to your petitioners, in pursuance of said warrant, had not been completed when it became dark shortly after five o'clock in the afternoon of February 15, 1924, and that the taking of wine was then suspended for the day, but that certain agents of those who had taken said fifty barrels of wine were left in charge and are still in charge of said premises, and that certain of them then informed your petitioner, Domenico Dumbra, that they proposed to take the residue of the wine on said premises which was in removable containers and to

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take or seal the wine on said premises not in such containers but in vats.

6. That on the 25th day of February, 1924, a libel was presented to this Court by Hon. William Hayward, District Attorney for the United States for the Southern District of New York, and duly filed against certain wine and other property of your petitioners said to be located at No. 513 East 16th Street, New York City, as your petitioners first learned in court on February 26, 1924. Your petitioners intend to except to said libel and if
35 their exceptions be overruled to defend the same. Exhibit "F" is a copy of said libel.

7. That there is wine belonging to your petitioners remaining on said premises in barrels and kegs to the amount of about three hundred and fifty barrels, which is of the value of not less than Twenty Thousand ($20,000) Dollars, besides a large quantity of wine in vats; and that said fifty barrels of wine were and are of the value of Three Thousand ($3,000) Dollars, and that said fifty barrels in which it was contained were and are of the value of One Hundred and Twenty-five ($125) Dollars.

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8. On information and belief that a copy of the affidavit of Joseph Smith recited and referred to in the said search warrant has been furnished by attorneys acting for the United States in the premises to the attorney for your petitioners, and a copy of said affidavit is hereto annexed as Exhibit "B."

9. On information and belief that demand has been made of said Merrick and said Biggins for

the return of said fifty barrels of wine and said barrels which has been refused.

10. That on or about December 19, 1923, a permit under the "National Prohibition Act and Regulations issued thereunder" was duly issued to your petitioners by Roy A. Haynes, Federal Prohibition Commissioner, a copy of which is hereto annexed as Exhibit "C," and that in order to obtain said permit your petitioners furnished and delivered to the said commissioner a bond in the penal sum of $50,000, executed by United States Fidelity & Guaranty Company as surety, 38
and that said permit has not been revoked but is together with said bond in full force and effect.

11. That the said premises at No. 512 East 16th Street, New York City, where your petitioners' winery is located as aforesaid contain no door or other opening into and have no connection of any kind with the adjoining premises at No. 514 on said street, referred to in the said affidavit Exhibit "B" hereto annexed, as further appears by the affidavit of John Peters hereto annexed as Exhibit "D."

12. That at the time when said wine was so re- 39
moved the internal revenue tax payable to the United States thereon had not been paid, said premises where it was then located being a bonded storeroom.

13. That all wine which has been sold or delivered from said premises since the issuance of said permit has been sold and delivered only to persons, firms and corporations authorized by law to buy and receive the same and upon the

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papers required and prescribed by the "National Prohibition Act and Regulations thereunder," and that the petitioners have in all respects complied with said act and regulations and have not either before or since the issuance of said permit violated the same in any respect.

14. Petitioners have been doing a large business and their sales all made in accordance with the National Prohibition Act have amounted to about Two Hundred and Fifty Thousand ($250,000) Dollars per year, and petitioners have a
41 large number of customers who have permits authorizing them to purchase wine, the number of such customers being not less than about one hundred and they depend upon the petitioners largely or entirely for their supply of wine, and if the petitioners are prevented from supplying the legitimate and lawful demands of said customers their business, which it has taken many years to build up, will be ruined and they will suffer irreparable injury.

15. On information and belief that your petitioner, Domenico Dumbra and Frank Miletto, one of your petitioners' employees, were arrested on
42 February 15, 1924, for committing the unlawful acts mentioned in said warrant, but that their prosecution on such charge has been abandoned by the United States, and that no other arrest has been made for any alleged violation of law at said number 512 East 16th Street, New York City, of any person associated with or employed at petitioners' winery.

16. On information and belief that Exhibit "E" which is annexed hereto is a copy of the re-

turn upon said warrant made by the said Biggins to Honorable John C. Knox, the Judge of this Court by whom said warrant was issued, the same having been furnished to your petitioner's attorney by the United States District Attorney for the Southern District of New York. 43

17. On information and belief that said warrant was issued for the enforcement of the National Prohibition Act, and that Roy A. Haynes is the Federal Prohibition Commissioner, and Palmer Canfield is Federal Prohibition Director for the State of New York, and that Romaine Q. Merrick is Divisional Chief of Prohibition Agents; and that the said Merrick now has the custody and control of said fifty barrels of wine and that he and said Biggins are in charge of the execution of said warrant. 44

18. Your petitioners respectfully show that said search warrant, so far as it related to said premises, No. 512 East 16th Street, New York City, is in violation of defendants' rights under the Fourth Amendment to the Constitution of the United States, and of Section 2 of Title 2 of the Act of Congress known as the Volstead Act, in that it was issued without evidence of probable cause to believe that a violation of the National Prohibition Act, or of any other law, had been committed by your petitioners or either of them or on the said premises on which their said winery is located from which said wine and barrels were removed. 45

19. Your petitioners further respectfully show that said search warrant was unlawful for the further reason that your petitioners have, and

had at the time of the said removal, a permit duly issued to them by the Prohibition Commissioner of the United States under which they had the right to have said wine in their possession on said premises, and had furnished a bond in the penal sum of $50,000 as one of the conditions for the issuance to them of such permit, as hereinbefore set out.

20. And your petitioners finally respectfully show that said warrant was unlawful in that the said James J. Biggins, to whom it was directed,
47 as not a civil officer of the United States nor a person designated by the President nor any member of his cabinet, and that therefore he could not legally execute the said search warrant.

21. That no previous application has been made for an order to show cause herein. The proceedings other than those stated above which have been had in respect to the matters herein set out, are that on the morning of February 16, 1924, an order to show cause was granted by Honorable Henry W. Goddart, one of the Judges of this Court, entitled in an action about to be brought
48 aganist said Biggins and others to permanently enjoin the threatened seizure of petitioners' wine, and said order to show cause contained a temporary stay or injunction prohibiting the seizure of said wine until the return day thereof, which was February 19, 1924; on the day last mentioned, said motion was adjourned for one week and such stay or injunction continued; and that upon the adjourned day the Court directed that the stay further continue pending the motion; shortly after the granting of said order to show cause, and before the return thereof, an action was com-

menced by your petitioners against said Biggins and others for the relief above referred to by the filing of a verified bill of complaint and the issuance of a subpoena, the number of the cause so begun being 28-367, and said subpoena and bill of complaint have been served on said James J. Biggins, but there has been no appearance in said action on behalf of any of the defendants; your petitioners have not yet been served with any process nor appeared in the libel for forfeiture hereinbefore mentioned; the said Romaine Q. Merrick has informed petitioners' attorneys that the Government is represented in said matters by the United States District Attorney for the Southern District of New York, and that service of papers in reference to said matter upon him and upon the United States District Attorney is sufficient. The affidavit, Exhibit "D", is a copy of an affidavit forming part of petitioners' application mentioned above for the return of said fifty barrels of wine.

WHEREFORE, your petitioners pray that the said search warrant so far as it affects No. 512 East 16th Street, Borough of Manhattan, City of New York, N. Y., be quashed and vacated, and the said fifty barrels of wine seized thereunder returned to your petitioners, and that your petitioners may have such other and further relief as may be just and proper in the premises.

Dated, New York, February 27, 1924.

DOMENICO DUMBRA
and FORTUNATO CHIAPPARONE
(D. DUMBRA & CO.)
Petitioners.
By DOMENICO DUMBRA.

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UNITED STATES OF AMERICA,
Southern District of New York
State and County of New York
Borough of Manhattan
} ss.:

DOMENICO DUMBRA, being duly sworn, deposes and says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes
53 it to be true.

DOMENICO DUMBRA.

Sworn to before me this
25th day of February, 1924.

LILLIAN VAN HOUTEN,
Notary Public Queens County No. 2573,
Certificate filed in New York County
New York County Clerk's No. 87,
New York County Register's No. 5059,
Certificate filed in Kings County
Kings County Clerk's No. 11,
Kings County Register's No. 5922,
Commission expires March 30, 1925.

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EXHIBIT "A."

(Copy of a Search Warrant herein granted by Hon. John C. Knox under date of Feb. 15, 1924).

EXHIBIT "B."

(Copy of affidavit of Joseph Smith verified Feb. 15, 1924).

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EXHIBIT "C."

Serial No. N. Y.-A-197
Renewal

TREASURY DEPARTMENT
UNITED STATES INTERNAL REVENUE
Form 1405-Revised Dec., 1922.
PERMIT ISSUED UNDER THE NATIONAL PROHIBITION ACT AND REGULATIONS ISSUED THEREUNDER.
35193-R. P.

Office of Federal Prohibition Commissioner,
WASHINGTON, D. C. 56

To D. Dumbra & Co., Domenico Dumbra, Fortunato Chiapparone,
Bonded Winery #87,
512 East 16th Street,
New York City, New York.

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the further restrictions of your State Law, to manufacture and sell wines for other than beverage purposes, to wit:

In accordance with the provisions of Section 30, Article 4, Regulations 60, such wines to be 57 disposed of in accordance with the provisions of Sections 31, 32 and 33, Article 4, Regulations 60.

This permit also confers authority to purchase and receive wine from others having approved permits to sell the same, such wine to be used only for the purpose of blending such wine manufactured at Bonded Winery #87, and not for resale as such.

The quantity of wine to be produced and received during any quarterly period of the calen-

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dar year, plus the quantity on hand at the beginning of such period, must not exceed 100,000 gallons of wine.

This permit is given on the condition, and with the understanding, that the business which it authorizes shall, at any time within the usual business hours, be subject to inspection by any Internal Revenue or Prohibition officer as to any requirement of the Internal Revenue or Prohibition laws, and by any State officer for the
59 purposes authorized in Section 34 of the National Prohibition Act, and any denial of, or interference with, such inspection will be deemed grounds for citation for revocation.

The penal sum of the bond required to support this permit shall be not less than $50,000—5-28-23.

This permit is effective from the date hereof, and will remain in force until December 31, 1924, unless revoked, suspended, or renewed as provided by law or regulations. All provisions of Regulations 60 relating to permits and their effect
60 are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto suspend this permit; and this permit may be revoked, suspended, modified, amended, supplemented, extended, or renewed in the manner and for the causes set forth in Regulations 60, or specifically set forth herein, or agreed to by the permittee, or otherwise provided by law. This permit confers only a per-

sonal privilege and confers no vested rights, and is not transferable or assignable, and if transfer of permit is directly or indirectly attempted this permit may be revoked. All conditions and provisions of this permit must be strictly observed.

Dated this Dec. 19, 1923 day of , 192 .

16863 R. H. HAYNES,
Prohibition Commissioner.

Government Printing Office
DS. 2-9472

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EXHIBIT "D."

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE for return of 50 barrels of wine and containers seized under search warrant affecting premises at No. 512 East 16th Street, in the Borough of Manhattan, City of New York, N. Y.

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Affidavit of JOHN PETERS.

UNITED STATES,
Southern District of New York,
State and County of New York,
Borough of Manhattan. } ss.:

JOHN PETERS, being duly sworn, deposes and

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says that he is and for several years past has been engaged in the real estate business and has an office at No. 210 East 14th Street, Borough of Manhattan, City of New York, N. Y., and that he is familiar with the premises at No. 512 East 16th Street in said Borough and City where the winery of the petitioners above named is located.

The building on said premises is a brick building and the basement and first floor thereof are entirely occupied by said winery and there is no door nor opening of any kind nor any connection what-
65 ever from said winery on either side to the adjoining premises and there is no connection or passageway from said winery to any of the floors on same premises above the said winery.

Deponent is not in any way interested in this matter.

JOHN PETERS.

Sworn to before me this
23rd day of February, 1924.

W. MACCAMMON,
Notary Public, Rockland County,
Cert. filed in New York Co.,
66 New York Co. No. 74,
New York Co. Register No. 4069.

EXHIBIT "E."

(Copy of Return on Search Warrant verified Feb. 18, 1924).

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EXHIBIT "F."

UNITED STATES DISTRICT COURT,
Southern District of New York.

At the February Term in the year one thousand nine hundred and twenty-four.

BEFORE THE HONORABLES
Learned Hand,
Augustus N. Hand,
John C. Knox, 68
Henry W. Goddard,
Francis A. Winslow and
William Bondy.
Judges of the United States District Court for the Southern District of New York.

On the 25th day of February, 1924, comes Hayward, United States Attorney for the Southern District of New York, in a cause of seizure and forfeiture of property under the laws of the United States, to wit, the Act of Congress of October 28, 1919, and the provisions of Sections 3450 and 3453 of the Revised Statutes of the United States, and on information and belief in- 69
forms the Court as follows:

FIRST: That on or about the 15th day of February, 1924, the Divisional Prohibition Chief for the States of New York and New Jersey duly appointed by the Federal Prohibition Commissioner did seize within the Southern District of New York the following described property, to wit:

70 Petition.

385 barrels containing 50 gallons of wine each,
71 barrels containing 25 gallons of wine each,
3 jugs containing 10 gallons each,
1922 bottles of wine,
10 vats containing the following respective quantities of wine: 3429 gallons, 3429 gallons, 3950 gallons, 2127 gallons, 900 gallons, 2960 gallons, 2960 gallons, 750 gallons, 2960 gallons, 2960 gallons;
1 press,
1 crusher,
71 1 corking machine,
1 filter,
2 pumps,
1 bottle washer.

Said property was located in premises occupied by D. Dumbra & Company, 513 E. 16th Street, Borough of Manhattan, City and Southern District of New York and the said articles above named are now held by the said Divisional Prohibition Chief as forfeited to the United States for the causes propounded as follows:

SECOND: That the aforesaid intoxicating
72 liquors and articles were at the time and place aforesaid, used and intended for use in the manufacture, sale, barter, transportation, importation, exportation, delivery and furnishing of intoxicating liquors for beverage purposes in violation of the said Act of Congress of October 28th, 1919, and were deposited in said premises with intent to defraud the United States of Internal Revenue taxes imposed thereon in violation of the provisions of Section 3450 of the Revised Statutes of the United States and that the said articles were in the possession of certain persons for the purpose of being sold or removed in fraud of the In-

ternal Revenue laws, and the articles above-named other than intoxicating liquors were in the place or building in which said intoxicating liquors held in fraud of the Internal Revenue laws then and there were in violation of the provisions of Section 3453 of the Revised Statutes of the United States.

And the attorney for the United States saith that all and singular the premises are true and within the jurisdiction of this Honorable Court and that by reason thereof and that by force of the statute in such case made and provided, the above-named intoxicating liquors and articles be and are subject to forfeiture.

Wherefore, the said attorney for the United States prays that due process issue in that behalf as well of attachment to bring said property within the custody of the Court as of monition to all parties in interest to appear on the return of such process and duly intervene herein by claim and plea in the premises, and due process being had thereon that for the causes aforesaid the said merchandise aforesaid be condemned by decree of forfeiture and the proceeds thereof be distributed according to law, or such other disposition be had thereof as the Court shall direct.

William Hayward,
United States Attorney for the
Southern District of New York,
Proctor for Libellant,
Office and Post Office Address:
United States Courts and
Post Office Building,
Borough of Manhattan,
City of New York.

(Notice and petition indorsed; filed April 14, 1924).

76 Supplemental Moving Affidavit.

Supplemental Moving Affidavit.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant.

77

SUPPLEMENTAL AFFIDAVIT OF DOMENICO DUMBRA.

78 UNITED STATES OF AMERICA,
Southern District of New York,
State and City of New York,
Borough of Manhattan, } ss.:

DOMENICO DUMBRA, one of the petitioners herein, being resworn, deposes and says, by way of supplement of the petition verified by him February 27, 1924, that at the time when the fifty barrels of wine referred to in said petition were taken from the winery of the petitioners at No. 512 East 16th Street, New York City, on February 15th, 1924, and immediately following the

removal of the said wine from the said premises set out in said petition, deponent and one Frank Miletto, who was there employed by the petitioners, were placed under arrest by certain persons who had taken part in the removal of said wine but were and are otherwise unknown to deponent, and by them taken to the Twenty-first Precinct Police Station of the Borough of Manhattan, City of New York, which is located at 327 East 22nd Street, in said City and Borough, and deponent and said Miletto were there charged with having violated the National Prohibition Act at said number, 512 East 16th Street, in said 80
Borough and City, by having intoxicating liquor in their possession there illegally, and they were, by the officer in charge of said station, thereupon each admitted to bail in the sum of Five Hundred ($500) Dollars which was furnished by a United States Liberty Bond of One Thousand ($1,000) Dollars, thereupon delivered to the officer in charge of said Police Station, and deponent and said Miletto were then notified by the said officer in charge of the said Police Station, to appear for examination before United States Commissioner Boyle at his office in the Federal Building in said City and Borough on the 19th 81
day of February, 1924, at 10 o'clock A. M. Deponent's co-partner, the other petitioner herein, Fortunato Chiapparone, was not present and was not arrested, and no other arrest was made at said number 512 East 16th Street, Borough of Manhattan, New York City.

On February 19, 1924, at 10 o'clock A. M., deponent and said Miletto appeared at the said office of United States Commissioner Boyle and waited there from that time until about 2 o'clock

32 Supplemental Moving Affidavit.

in the afternoon, but no one appeared against them and they were informed on inquiry by the Commissioner that no charge or information had been there filed against them.

A few days later and shortly before the verification by deponent of the petition herein, he was notified to call at said Twenty-first Police Precinct Station, and did so, and the officer then in charge returned to him the Liberty Bond of One Thousand ($1,000) Dollars which had been there deposited for bail on February 15, 1924. No other
83 or further proceedings of any kind have been had in said matter against deponent and no other or further notice of any kind has been received by him therein.

From all of the foregoing, deponent understands and is advised by his attorney herein, that the charge against him for violating the National Prohibition Act at No. 512 East 16th Street, New York City, has been quashed and withdrawn.

DOMENICO DUMBRA.

Sworn to before me this
28th day of February, 1924.

84 LILLIAN VAN HOUTEN,
Notary Public, Queens County No. 2573.
Certificate filed in New York County.
New York County Clerk's No. 87.
New York County Register's No. 5059.
Certificate filed in Kings County.
Kings County Clerk's No. 11.
Kings County Register's No. 5022.
Commission expires March 30, 1925.

(Indorsed; filed April 14, 1924).

Order Resettling Order Denying Motion. 85

Order Resettling Order Denying Motion.

At a term of the United States District Court for the Southern District of New York, held at the Federal Building, Borough of Manhattan, City of New York, N. Y., on the 5th day of June, 1924.

Present—Hon. John C. Knox, U. S. Judge.

In the Matter

of

The Application of Domenico Dumbra and Fortunato Chiapparone to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant. 86

ORDER RESETTLING ORDER. 87

An order having been granted by this Court in the above entitled matter under date of May 7, 1924, and duly entered in the office of the Clerk of this Court, from which the recital of certain papers and of facts regarding the official position of James J. Biggins, which were considered by the Court in rendering its decision herein, were omitted; now it is

Ordered that the said order of May 7, 1924,

88 Order Resettling Order Denying Motion.

herein be and the same is hereby resettled and amended so as to read as follows:

ORDER DENYING MOTION.

At a term of the United States District Court for the Southern District of New York, held at the Federal Building, in the Borough of Manhattan, City of New York, N. Y., on the 7th day of May, 1924.

89 Present—Hon. John C. Knox, U. S. Judge.

In the Matter

of

The Application of Domenico Dumbra and Fortunato Chiapparone to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels
90 of wine seized therefrom under said warrant.

A motion to quash the search warrant issued by Hon. John C. Knox, one of the Judges of this Court, February 15, 1924, affecting premises No. 512 East 16th Street, Borough of Manhattan, City of New York, N. Y., and for the return of 50 barrels of wine seized under said warrant having come on to be heard upon the notice of said mo-

tion dated February 27, 1924, and returnable before the said the Hon. John C. Knox, one of the Judges of this Court on the 29th day of February, 1924, and upon the petition of said petitioners verified February 25, 1924, and the affidavit of John Peters verified February 23, 1924, and upon the supplemental affidavit of petitioner Domenico Dumbra verified February 28, 1924, the search warrant referred to in said petition issued by Hon. John C. Knox, February 15, 1924, and affidavit of Joseph Smith recited therein verified on that day, both heretofore filed, and the permit 92
issued to petitioners by R. A. Haynes, Prohibition Commissioner, under date of December 19, 1923, and it being conceded that the only office of James J. Biggins to whom the said warrant was issued at the time when it was issued to him was an agent and employee of the United States appointed by the Commissioner of Internal Revenue, said appointment having been duly approved by the Secretary of the Treasury and that said Biggins held no other office; and after hearing Charles Marvin, of counsel for petitioners, for the motion, and Elmer Lemon, Assistant United States District Attorney, opposed, and after due deliberation it is 93

Ordered that the said motion be and the same is hereby in all things denied.

John C. Knox,
U. S. Judge.

(Entered in the office of the Clerk of the United States District Court for the Southern District of New York, June 5, 1924).

94 Opinion.

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE, to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant.

95

CHARLES F. MURPHY, attorney for applicants (Roscoe C. Harper and Charles Marvin, of counsel);

WM. HAYWARD, United States Attorney, for Government (Elmer H. Lemon, Assistant United States Attorney, of counsel).

96

KNOX, D. J.,

Petitioners own and operate a bonded winery at 512 East 16th Street, this city. They have upon said premises a large quantity of wine, alleged to be held for purposes not unlawful under the National Prohibition Act.

In the building, next adjoining upon the east, known as 514 East 16th Street, is a grocery store,

which, it would appear, is conducted by the wife and son of one of the petitioners.

Pursuant to a search warrant, issued February 15, 1924, officers of the Internal Revenue Department made a search of both of the above mentioned premises and seized a quantity of intoxicating liquors fit for beverage purposes. Fifty barrels of wine were taken from the winery when the removal of further quantities was stayed. From the grocery store, seventy-four gallons of wine, in bottles of various sizes, were removed.

This motion is made to quash the search war- 98
rant so far as it affects 512 East 16th Street, and to obtain the return of the fifty barrels of wine taken therefrom. Assertion is made that the search warrant, so far as it related to the winery, was granted without probable cause; and in violation of petitioners' rights under the Fourth Amendment.

It is also asserted that the person to whom the warrant was issued, viz., James J. Biggins, an agent and employee of the United States, appointed by and acting under authority of the United States Treasury Department, and charged with the duty of enforcing the National Prohibition Act, was not a civil officer, with authority 99
to execute the warrant.

The affidavit, which is said to be insufficient to make out a case of probable cause in support of the search warrant, may be summarized as follows:

Upon February 12, 1924, Joseph Smith, accompanied by other revenue agents, went to the store at 514 East 16th Street, adjoining the winery. He saw the wife and one son of the petitioner

Dumbra. One of the agents said he wished to purchase a gallon of sherry wine, while Smith asked for a gallon of port. The son replied that the price of the former was six dollars per gallon, and that of the latter was five dollars. He then went to the rear of the store beyond a partition where he turned to the right in the direction of the winery. He shortly returned with the wine and wrapped the containers in separate packages. One of the agents then gave Mrs. Dumbra the sum of eleven dollars in payment. The agents left. As they did, the son went from the front door of the grocery and entered the winery.

Upon another occasion, which from the context of the affidavit I shall assume was shortly prior to February 12th, Smith went to the grocery store where he saw young Dumbra. Telling him that he wished a gallon of wine, Smith was asked if "Burnsie" had sent him. Being given an affirmative answer, Dumbra said, "All right," whereupon Smith paid him five dollars, and was told to wait outside on the street. As Smith went out Dumbra walked to the rear of the store where he turned towards the winery. In a few minutes, he came out of the front door of the winery and delivered the wine to Smith. No permit, indicating that Smith wished the wine for sacramental or religious purposes and was authorized to purchase it, was delivered to Dumbra or requested by him in either instance.

The affidavit then went on to say that Smith knew that wine was being sold in the grocery store, and that the source of supply was the adjoining winery.

In support of the motion now made, it is stated, by an affidavit, that petitioners have a permit,

issued under date of December 19, 1923, authorizing them to conduct a bonded winery, where wine for other than beverage purposes may be manufactured, sold and blended. As security for the observance of the law and regulations covering such a place of business, petitioners have given a bond in the sum of $50,000. Such permit was unrevoked upon the day the warrant was executed. The winery is said to contain no door or other opening connecting with the grocery store. The allegation is made that no wine has been sold to persons unauthorized to purchase the same, and 104
that compliance has been had with all requirements of law. It is also set up that the business, thus legitimately conducted, amounts to about $250,000 per year, and that more than one hundred persons, authorized to purchase wine, depend upon petitioners for their supply, which trade, if the warrant be sustained, will be ruined.

No denial is made that the persons who sold wine to Smith in the grocery store sustain the relationship of wife and son to Domenico Dumbra, who makes the main affidavit in support of the motion to vacate the warrant. No explanation is given as to how the wine found in the grocery store came to be there. In the absence of proof 105
to the contrary, it is reasonable to suppose that it came from the winery, and that it was intended for sale for unlawful purposes. The inference may also be made that, as required, the stock of wine in the grocery was replenished from the winery. If the senior Dumbra is in no way chargeable with these necessary inferences, he should specifically show his lack of connection with the facts averred in the Smith affidavit. If they are open to a truthful denial, and it was made, a hear-

106 Opinion.

ing might be had under the provisions of Section 15 of the Espionage Act. The only statement of a specific nature tending to avoid the conclusion that the wine in the store came from the winery is that no door physically connects the two premises.

While only two actual sales of wine are set forth in the Smith affidavit, the finding of seventy-four bottles of wine in the store indicates a readiness to make many more sales.

The circumstances, as a whole, are enough to
107 cause one to conclude that the business, as carried on in the winery, and in what seems to be its authorized outlet, was unlawful and that the winery was not immune from search and seizure upon probable cause. *In re Kupferberg,* 284 Fed., 914. The search, therefore, was not in violation of the Fourth Amendment to the Constitution.

Upon the contention that Biggins was not a civil officer, authorized to execute the search warrant, petitioners' counsel cites the case of *United States* vs. *Musgrave,* 293 Fed., 203. The decision has been examined, and with respectful deference to the Judge who wrote it, I must withhold my concurrence. The later ruling of Judge Ervin
108 in *United States* vs. *O'Connor,* 294 Fed., 584, seems to me to be expressive of the purpose of the Congress upon this subject, and will be followed.

Petitioners' motion is denied.

March 25, 1924.

JOHN C. KNOX,
U. S. D. J.

(Indorsed; filed April 14, 1924).

109

Assignment of Errors.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE, to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized there from under said warrant.

110

ASSIGNMENT OF ERRORS.

111 Now come the petitioners Domenico Dumbra and Fortunato Chiapparone by Charles F. Murphy, their attorney, and in connection with their petition for writ of error say, that in the record and proceedings and in the final order herein, manifest error has intervened to their prejudice, to wit:

1. That the search warrant was issued in violation of the rights of the petitioners under the Fourth Amendment to the Constitution of the

112 Assignment of Errors.

United States, in that it was issued without first showing to the Judge of this Court who issued it that there was probable cause to believe that the offense stated therein (to wit: unlawfully holding and possessing intoxicating liquors containing more than one half of one per cent of alcohol in volume fit for use for beverage purposes at the winery located at No. 512 East 16th Street, and at the grocery store No. 514 East 16th Street, Borough of Manhattan, City of New York), had been committed at said winery.

113 2. That the Court erred in finding in substance in its opinion that the facts showed "the finding of seventy-four bottles of wine in the (grocery) store" (at No. 514 East 16th Street), there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect.

3. The Court erred in finding in substance in its opinion that the person described in the affidavit on which the search warrant was granted as "Mrs. Dumbra," was the wife of petitioner Domenico Dumbra, there being no allegation to that effect in the affidavit on which the search
114 warrant was granted, nor other proof before the Court to that effect.

4. The Court erred in finding in substance in its opinion that the person described in the affidavit on which the search warrant was granted as the "son of Mrs. Dumbra," was the son of petitioner Domenico Dumbra, there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect.

Assignment of Errors. 115

5. The Court erred in finding in substance or by implication, in its opinion, that the two sales or the sales on two occasions, of wine alleged to have been made from the grocery store at No. 514 E. 16th Street, together with the allegation that one gallon of the wine so alleged to have been sold was brought from the winery by "Mrs. Dumbra's son," occurred with the knowledge or consent of petitioners, who were the owners of the winery, or of either of them, there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect. 116

6. The Court erred in finding in substance in its opinion that the allegations in the said affidavit of Joseph Smith to the effect that when wine was purchased at the grocery store at No. 514 E. 16th Street, the person who delivered it went to the rear part of the store at those premises and turned towards the winery, tended to establish that the winery was the source from which the wine alleged to have been sold was delivered, there being no allegation that there was any connection between the grocery and the winery, and the fact that there was no connection being established by the moving affidavits. 117

7. The Court erred in finding in substance in its opinion that the burden was upon petitioners to explain the alleged presence of wine at the premises No. 514 East 16th Street, adjoining the said winery, there being no allegation in the affidavit on which the warrant was granted that they or either of them had any control over or connection with the said grocery premises, nor any proof before the Court to that effect.

118 Assignment of Errors.

8. The Court erred in accepting in substance in its opinion the allegation in the said affidavit of Joseph Smith to the effect that

> "I know that wine is being sold from the grocery store at 514 E. 16th Street, and that the source of supply is the winery located at 512 E. 16th St."

as proof showing or tending to show that said statement was true.

119 9. The Court erred in finding in substance in its opinion that the store at No. 514 East 16th Street, which adjoined the winery

(a) "seemed to be its authorized outlet," the facts shown not warranting that conclusion

(b) that "in the absence of proof to the contrary, it is reasonable to suppose that it (the wine in the grocery) came from the winery," and

(c) "that it was intended for sale for unlawful purposes."

120 10. The Court erred in finding in substance in its opinion that the statements contained in the said affidavit of Joseph Smith on which the search warrant was issued were sufficient to constitute probable cause to believe that the offense charged had been committed at the winery, there being no allegation in said affidavit that the petitioners who conducted the winery there, did not have a lawful permit to there hold and possess the intoxicating liquors there kept, the fact, recognized in the opinion of the Court and known to the

Government when the search warrant was issued, being that they had such a permit which was in force when the warrant was issued.

11. The Court erred in finding in substance in its opinion that James J. Biggins to whom the search warrant was issued, was a civil officer, within the meaning of the National Prohibition Act, or authorized to execute the search warrant, his only office being that of an agent or employee for the enforcement of the National Prohibition Act under appointment from the Commissioner of Internal Revenue. 122

12. The Court erred in denying the application to quash the search warrant as to the premises No. 512 East 16th Street.

13. The Court erred in refusing to order the return of 50 barrels of wine seized under the search warrant.

WHEREFORE your petitioners pray that the order of the District Court of the United States for the Southern District of New York herein may be reversed and that the return of the 50 barrels of wine seized under the search warrant to your petitioners be directed. 123

Dated, New York, June 7, 1924.

CHARLES F. MURPHY,
Attorney for Petitioners,
141 Broadway,
Manhattan,
New York, N. Y.

(Indorsed; filed June 7, 1924).

124 Petition for Writ of Error.

Petition for Writ of Error.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of DOMENICO DUMBRA and FORTUNATO CHIAP-
125 PARONE to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrel of wine seized therefrom under said warrant.

PETITION FOR WRIT OF ERROR.

Now come Domenico Dumbra and Fortunato Chiapparone, petitioners herein, and say:

126 That on or about the 5th day of June, 1924, the District Court entered an order herein against the petitioners, and in the said order and in the proceedings had prior thereto herein certain errors were committed to the prejudice of petitioners, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE these petitioners pray that a writ of error may issue in their behalf out of the Supreme Court of the United States for the correc-

tion of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, June 7th, 1924.

CHARLES F. MURPHY,
Attorney for Petitioners,
141 Broadway,
Manhattan,
New York, N. Y.

(Indorsed; filed June 7, 1924).

128

Order Allowing Writ of Error.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises and for the return of 50 barrels of wine seized therefrom under said warrant.

129

ORDER ALLOWING WRIT OF ERROR.

On this 7th day of June, 1924, come the petitioners by their attorney and file herein and pre-

130 Bond.

sent to the Court a petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the order herein was made, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration thereof the Court does allow the writ of error upon the petitioners giving bond
131 according to law in the sum of $250 which shall operate as a supersedeas bond.

Dated, New York, June 9, 1924.

L. HAND,
U. S. Judge.

(Indorsed; filed June 7, 1924).

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we,
132 DOMENICO DUMBRA and FORTUNATO CHIAPPARONE, as principals, and NATIONAL SURETY COMPANY, as surety, are held and firmly bound unto United States of America in the full and just sum of Two hundred fifty and 00/100 ($250.00) Dollars, to be paid to the said United States of America, its certain attorneys or assigns to which payment well and truly to be made do bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents, sealed with our seals this 25th day of June in the year of our Lord one thousand nine hundred and twenty-four.

Bond. 133

Whereas lately at a District Court of the United States in a proceeding pending in said Court an order was made denying a motion by said DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash a certain search warrant which had been issued at the instance of the United States of America, and for the return of 50 barrels of wine which had been seized thereunder, and the said DOMENICO DUMBRA and FORTUNATO CHIAPPARONE having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the said order, and a citation directed to the said United States of America citing and admonishing it to 134
be and appear at a Supreme Court of the United States within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said DOMENICO DUMBRA and FORTUNATO CHIAPPARONE shall prosecute said writ of ereor to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; or else to remain in full force and virtue.

Sealed and delivered in the
presence of:

WILLIAM A. COYLE. 135

.....

DOMENICO DUMBRA [SEAL]
FORTUNATO CHIAPPARONE [SEAL]
NATIONAL SURETY COMPANY
[SEAL] By:
H. E. EMMETT
Resident Vice-President.

Attest:
N. V. TYNAN
Resident Assistant Secretary.

136 Bond.

UNITED STATES OF AMERICA,
State and Southern District of New York, } ss.:

On the 24 day of June, 1924, before me personally came DOMENICO DUMBRA and FORTUNATO CHIAPPARONE, both to me known to be the individuals described in and who executed the foregoing bond and duly severally acknowledged that they executed the same.

WILLIAM A. COYLE,
Notary Public.

137 STATE OF NEW YORK,
County of New York, } ss.:

On this 24th day of June, 1924, before me personally appeared H. E. EMMETT, Resident Vice-President of the National Surety Company with whom I am personally acquainted, who, being by me duly sworn, says that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it
138 was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like order. And said H. E. Emmett further said that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said N. V. Tynan, subscribed to the said instrument is in the genuine handwriting of the said N. V. Tynan, and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter

33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended by Chapter 182 of the Laws of the State of New York for the year 1913, issued to the National Surety Company his certificate that said Company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law; and that such certificate has not been revoked.

M. O'DONNELL,
Notary Public, etc.

COPY OF BY-LAW.

BE IT REMEMBERED: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

ARTICLE XIII.

Section 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the

President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the
143 Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "SEAL" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK, }
County of New York, } ss.:

I, N. V. TYNAN, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Laws with the original thereof,
144 as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of Article XIII, Section 1 of said original By-Law.

Given under my hand and seal of the Company, in the County of New York. This 24th day of June, 1924.

N. V. TYNAN,
Resident Assistant Secretary.

(Indorsed: Approved June 25, 1924. John C. Knox, D. J. Filed June 26, 1924).

Citation.

145

UNITED STATES OF AMERICA, ss.:

TO THE UNITED STATES OF AMERICA, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the District Court of the Southern District of New York wherein Domenico Dumbra and Fortunato Chiapparone are plaintiffs-in-error and you are defendant-in-error, to show cause, if any 146 there be, why the order against the said plaintiffs-in-error as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the City of New York in the District above named this 25th day of June in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America, the one hundred and forty-eighth.

JOHN C. KNOX,
Judge of the District Court of the
United States for the Southern 147
District of New York.

(Indorsed: Service admitted this 3rd day of July, 1924. William Hayward, U. S. Att'y. Filed July 3, 1924.)

148

Stipulation as to Record.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash search warrant affecting premises 512 East
149 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above entitled matter as agreed upon by the parties.

150 Dated, New York, June 30th, 1924.

WILLIAM HAYWARD,
Attorney for United States of America.

CHARLES F. MURPHY,
Attorney for Petitioners.

Certificate by Clerk. 151

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

In the Matter
of
The Application of DOMENICO DUMBRA and FORTUNATO CHIAPPARONE to quash search warrant affecting premises 512 East 16th Street, Borough of Manhattan, City of New York, so far as it affects said premises, and for the return of 50 barrels of wine seized therefrom under said warrant. 152

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 7th day of June in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the said United States the one hundred and forty-ninth. 153

ALEXANDER GILCHRIST, JR.,
Clerk.

[SEAL]

No. 546

Supreme Court of the United States

OCTOBER TERM, 1924.

DOMENICO DUMBRA AND FORTUNATO CHAPPARONE,
Plaintiffs-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

CHARLES MARVIN,
Attorney and Counsel for Plaintiffs-in-Error,
141 Broadway,
New York.

WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

SUBJECT INDEX.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

DOMENICO DUMBRA and FORTUNATO CHAPPARONE,
Plaintiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

Error to the United States District Court for the Southern District of New York, for the review of an order granted by Hon. John C. Knox, District Judge, and entered (as re-settled) June 5, 1924, denying a motion to quash a search warrant which had been granted by him on February 15, 1924, against a permitted winery and other premises, so far as it affected the winery, and for the return of fifty barrels of wine which had been seized from under it from the winery.

Statement of Case.

The search warrant (fols. 6-10) was issued February 15, 1924, upon an affidavit (fols. 11-18), as it recites, made on that day, by one Joseph Smith, "an employee of the Treasury Department of the United States," charging that intoxicating liquors are:

> "held and possessed in a certain winery known as D. Dumbra and Co. located on the first floor and basement of the building located at 512 E. 16th Street and the grocery store adjoining said building located at 514 East 16th St., Borough of Manhattan, City and Southern District of New York," and "that said liquor is used and is intended for use and has been used in violating Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises."

The winery was conducted by D. Dumbra and Co., the plaintiffs-in-error under a permit, shown later on the motion without question (fols. 55-61, 37), which had been issued to them by the Treasury Department, and was bonded in the sum of $50,000 (fols. 45-46). Who conducted the grocery does not appear, but it was not alleged and has not been suggested that it was conducted by them. The opinion below found, however—erroneously we think—that it was the "authorized outlet" of the winery, in accordance with the general allegation in the affidavit that

> "from my investigation and purchases made by other agents of said premises, I know that wine is being sold from the grocery store at 514 East 16th Street, and that the source of supply is the winery located at 512 East 16th Street" (fol. 17).

The "other agents" are not specified and only facts alleged to have been ascertained in the "investigation" referred to and the only purchases specified as having been made—the *facts,* therefore, on which the charge is based—were the purchase, on two occasions, of wine (two gallons on one occasion and one on the other) at the *grocery,* without exhibition of sacramental permits, from a "Mrs. Dumbra" and her son, but the affidavit and the record generally (except the opinion, which *assumes* that they were the wife and son of Domenico Dumbra, one of the plaintiffs-in-error) is silent as to whether they

were in any way related to or connected with either of the plaintiffs-in-error, and does not even suggest (except by innuendo) that there was any opening or other connection between the grocery and the winery, which was denied later on the motion, without question, by the petition (fol. 35) and by the affidavit of a disinterested real estate agent who was acquainted with the property (fols. 62-65).

More particularly regarding the two alleged purchases, affiant says that on February 12th, he was present when two gallons of wine were purchased at the *grocery* by a fellow agent of the Treasury Department from "Mrs. Dumbra and her son," and that to obtain the wine the son went to the back part of the grocery "behind the partition" and turned to the right "toward the winery," and that on the other occasion, fixed in the affidavit only as "several days ago" but assumed in the opinion to have been "shortly prior to February 12th" (fol. 101) affiant arranged with the son *at the grocery store* for the purchase of another gallon of wine, following which the son went to the back part of the grocery store, turned toward the winery, and later came out from the winery with the wine and delivered it to the affiant.

It was not alleged and has not been suggested that either of the owners of the winery or any one placed in charge of it by them was present on the occasion of either of the alleged sales, and the affidavit contains no allegation of knowledge on the part of any such persons of these or of any other unlawful sales, and the petition presented on the motion later denies that any wine had been taken from the winery without proper permits (fol. 39).

The warrant was directed to one James J. Biggins, who it was conceded was at that time "an agent and employee of the United States appointed by the Commissioner of Internal Revenue, said appointment having been approved by the Secretary of the Treasury, and

that said Biggins held no other office (fol. 92)." It was executed by him, assisted by several prohibition agents under him (fol. 31).

From the return to the warrant (fols. 20-21) it appeared, for the first time, that seventy-four bottles of wine were found and seized at the *grocery*.

The return shows that a large quantity of wine was found at the winery, and fifty barrels of wine of the value of $3,000 and containers of the value of $125 (fol. 35), were seized at the winery and removed from the premises under the warrant (fol. 32) from the large stock of wine found there in barrels and vats, the rest of which was also seized but its removal at that time stopped by an order to show cause issued by Hon. Henry W. Goddard, United States District Judge.

The wine so seized was taken into the custody and control of Romaine Q. Merrick, Divisional Superintendent of Prohibition Agents, at the City of New York, and still remains there, as plaintiffs-in-error are informed (fol. 49).

The motion here under review was noticed on behalf of the proprietors of the winery, the plaintiffs-in-error, to quash the search warrant so far as it affected the winery, and for the return of the fifty barrels of wine, and containers seized, upon a notice of motion (fols. 22-27) and petition (fols. 28-75), and a supplemental affidavit (fols. 76-84) filed before the hearing of the motion, which was on February 29, 1924. Order denying the motion was entered May 7, 1924, and as re-settled June 5, 1924 (fols. 85 *et seq.*) An opinion was handed down under date of March 25, 1924 (fols. 94-108), which, as will be pointed out, proceeded largely on assumptions of fact not supported by the record.

The facts set out in the moving papers, to apprise the court of the situation, were, besides those to which reference has been made above, that plaintiffs-in-error

owned the wine and containers which had been seized and had the right to under their permit referred to to the possession of the wine in question (fol. 46) that (fols. 40-41) they had been doing a legitimate wine business under their permit at their winery referred to, to the amount of about $250,000 a year, and had not less than one hundred customers, who were permittees and depended upon the plaintiffs-in-error for their supply of wine, and that the business of plaintiffs-in-error, which it had taken them many years to build up, was seriously threatened with ruin by the search warrant.

The moving papers also set up, in order to negative any possible relation of the search warrant to any action against the wine, or the plaintiffs-in-error, growing out of the charge made in the warrant, (1) that at the time of the execution of the warrant on February 15, 1924, Dominico Dumbra, one of the plaintiffs-in-error, and Frank Miletto, one of their employees, were arrested and held in $1,000 cash bail, on the charge made in the warrant, but that on their appearing before United States Commissioner Boyle, as directed, on February 19, 1924, the criminal charge against them was abandoned, and the bail deposit later refunded, from which they had understood and had been advised that the criminal action had terminated, and there had been no other arrest on that charge (fols. 41-42 and supplemental affidavit, fols. 78-83). It may be proper for us to add that there has been no criminal action instituted since on that charge.

And (2) the petition further set out (fol. 34) that on February 25, 1924, a libel was filed in the United States District Court for the Southern District of New York, by the United States Attorney for that district, against certain wine and other property of the plaintiffs-in-error, described in the libel which is set out (fols. 67-75), and as "located in premises occupied by Dumbra & Co., *513* East 10th Street, Borough of Manhattan, City and South-

ern District of New York." That may be intended, notwithstanding that the location is given as No. 513 instead of 512, as the wine, containers and utensils, the removal of which was prevented by the order to show cause which has been mentioned, after its seizure and the removal of the 50 barrels here in question, but if so it will be seen that that libel does not run against the wine here in question, which had been removed.

The petition showed that it was intended to defend the libel (fol. 35), and it may be proper to add that an answer has since been interposed and that the case is still pending and undetermined, and that no subsequent libel has been filed.

The grounds of the motion specified in the notice (fols. 25-26) were that the search warrant violated the rights of the plaintiffs-in-error under the Fourth Amendment of the Constitution of the United States, in that it was granted without probable cause for believing the existence of the grounds on which it was granted so far as it affects the winery, and upon the ground that James J. Biggins, to whom the warrant was directed, was not one of the persons who are authorized by law to execute search warrants.

No answering affidavits or other traverse of the moving papers were offered. No hearing under Sec. 15 of the Espionage Act was asked nor had, our position there as here being that the granting of the warrant had been in violation of law, and that the plaintiffs-in-error because of the insufficiency of the affidavit were entitled, as matter of law, to have the wine seized from their winery returned to their possession under their permit.

As the permit plaintiffs-in-error had at that time is not now in force, the return this Court is asked to now direct, should be on condition, we assume, that they first secure a special permit to receive it.

The Errors Assigned.

The reason why we maintain that the search warrant should have been, and should now be quashed is, as stated above, the insufficiency of the affidavit on which it was granted. That is amplified and raised more concretely in the assignments of error (Transcript, pages 37-41), which may therefore serve as an introduction to the argument, and is as follows:

1. That the search warrant was issued in violation of the rights of the petitioners under the Fourth Amendment to the Constitution of the United States, in that it was issued without first showing to the Judge of this Court who issued it that there was probable cause to believe that the offense stated therein (to-wit: unlawfully holding and possessing intoxicating liquors containing more than one-half of one per cent of alcohol in volume fit for use for beverage purposes at the winery located at No. 512 East 16th Street, and at the grocery store No. 514 East 16th Street, Borough of Manhattan, City of New York), had been committed at said winery.

2. That the Court erred in finding in substance in its opinion that the facts showed "the finding of seventy-four bottles of wine in the (grocery) store" (at No. 514 East 16th Street), there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect.

3. The Court erred in finding in substance in its opinion that the person described in the affidavit on which the search warrant was granted as "Mrs. Dumbra," was the wife of petitioner Domenico Dumbra, there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect.

4. The Court erred in finding in substance in its opinion that the person described in the affidavit on which the search warrant was granted as the "son of Mrs. Dumbra," was the son of petitioner Domenico Dumbra, there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect.

5. The Court erred in finding in substance or by implication, in its opinion, that the two sales or the sales on two occasions, of wine alleged to have been made from the grocery store at No. 514 E. 16th Street, together with the allegation that one gallon of the wine so alleged to have been sold was brought from the winery by "Mrs. Dumbra's son," occurred with the knowledge or consent of petitioners, who were the owners of the winery, or of either of them, there being no allegation to that effect in the affidavit on which the search warrant was granted, nor other proof before the Court to that effect.

6. The Court erred in finding in substance in its opinion that the allegations in the said affidavit of Joseph Smith to the effect that when wine was purchased at the grocery store at No. 514 East 16th Street, the person who delivered it went to the rear part of the store at those premises and turned towards the winery, tended to establish that the winery was the source from which the wine alleged to have been sold was delivered, there being no allegation that there was any connection between the grocery and the winery, and the fact that there was no connection being established by the moving affidavits.

7. The Court erred in finding in substance in its opinion that the burden was upon petitioners to explain the alleged presence of wine at the premises No. 514 East 16th Street, adjoining the said winery, there being no allegation in the affidavit on which the warrant was

granted that they or either of them had any control over or connection with the said grocery premises, nor any proof before the Court to that effect.

8. The Court erred in accepting in substance in its opinion the allegation in the said affidavit of Joseph Smith to the effect that

> "I know that wine is being sold from the grocery store at 514 E. 16th Street, and that the source of supply is the winery located at 512 E. 16th St."

as proof showing or tending to show that said statement was true.

9. The Court erred in finding in substance in its opinion that the store at No. 514 East 16th Street, which adjoined the winery

> (*a*) "seemed to be its authorized outlet," the facts shown not warranting that conclusion,
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> (*b*) that "in the absence of proof to the contrary, it is reasonable to suppose that it (the wine in the grocery) came from the winery," and
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> (*c*) "That it was intended for sale for unlawful purposes."

10. The Court erred in finding in substance in its opinion that the statements contained in the said affidavit of Joseph Smith on which the search warrant was issued were sufficient to constitute probable cause to believe that the offense charged had been committed at the winery, there being no allegation in said affidavit that the petitioners who conducted the winery there, did not have a lawful permit to there hold and possess the intoxicating liquors there kept, the fact, recognized in the opinion of the Court and known to the Government when the search warrant was issued, being that

they had such a permit which was in force when the warrant was issued.

11. The Court erred in finding in substance in its opinion that James J. Biggins to whom the search warrant was issued, was a civil officer, within the meaning of the National Prohibition Act, or authorized to execute the search warrant, his only office being that of an agent or employee for the enforcement of the National Prohibition Act under appointment from the Commissioner of Internal Revenue.

12. The Court erred in denying the application to quash the search warrant as to the premises No. 512 East 16th Street.

13. The Court erred in refusing to order the return of 50 barrels of wine seized under the search warrant.

If the dissection we offer of this case be found more elaborate and some of our argument more elementary than is necessary to sufficiently present the questions involved, we plead in extenuation, the fact that those questions are new in the sense that they have not heretofore been passed upon by this Court, at least expressly, and in view of their importance, not only to the plaintiffs-in-error, whose concern in the decision is indirectly much greater than the value of the wine asked to be returned, but also to many others whose rights under the Fourth Amendment and the Acts of the Congress are menaced, we maintain, by such a course as was pursued here in the execution of the National Prohibition Act in the matter of granting search warrants.

ARGUMENT.

POINT I.

The requisite basis for a search warrant

AMONG THE PERTINENT GENERAL REQUISITES FOR A SEARCH WARRANT OF THIS KIND ARE:

A. THAT THE "FACTS" PRESENTED FOR ITS ISSUANCE SHALL BE FACTS IN THE LEGAL SENSE, THE FALSE ASSERTION OF WHICH IT WOULD BE PRACTICABLE TO PENALIZE AS PERJURY, AND NOT MERELY BELIEFS OR CONCLUSIONS.

B. THAT THE FACTS REFERRED TO SHALL BE SET OUT IN THE AFFIDAVITS OR DEPOSITIONS PRESENTED TO THE COURT BEFORE THE WARRANT IS ISSUED, RATHER THAN THAT THEY MAY CONSIST OF INFORMATION OBTAINED LATER OR IN OTHER WAYS.

C. THAT THE FACTS SO PRESENTED SHALL LOGICALLY ESTABLISH PRIMA FACIE, AND IMPORT, PROBABLE CAUSE TO BELIEVE THAT THE OFFENSE CHARGED OR OTHER GROUND ASSIGNED FOR THE WARRANT HAS BEEN COMMITTED OR EXISTS, RATHER THAN MERELY SUPPORT A SURMISE OR SUSPICION TO THAT EFFECT.

D. FINALLY, THAT IN DEALING WITH QUESTIONS IN REGARD TO SECURITY AGAINST UNREASONABLE SEARCH AND SEIZURE, SUCH LIBERAL CONSTRUCTION SHOULD BE ADOPTED AND SUCH POSITION TAKEN, AS WILL PREVENT STEALTHY ENCROACHMENT OR GRADUAL DEPRECIATION OF THAT RIGHT, MINDFUL ALWAYS THAT IT IS AMONG THOSE WHICH ARE OF THE VERY ESSECNCE OF CONSTITUTIONAL LIBERTY.

E. CERTAIN APPLICATIONS OF THOSE PROPOSITIONS TO THIS CASE.

A, B, C.

In support of the formulation given at A, B and C above of familiar and closely related doctrines, we treat

them together, for the reason that in some of the statutes and decisions to which we wish to refer, a single passage often bears on two or all of the three of them, or the passage bearing on one follows that bearing on another. It will be observed also that these authorities also illustrate proposition D above.

As will of course be recalled, the line which the Congress has in effect drawn, as to search warrants of this sort, between those which are reasonable, within the meaning of the Fourth Amendment, and those which are not, appears in the codification (for certain purposes) of the law of search warrants effected in the Espionage Act of June 15, 1917 (40 Stat. 228, Title XI, Comp. Stat. Ann. Supp. 1919 Sec. 102121 and 10496¼ et seq.) that part of which was expressly made applicable by the National Prohibition Act of October 28, 1919, 40 Stat. 228 Title II, Sec. 25, Comp. St. Ann. Supp. 1923, Sec. 10138½-m). Three of the sections of the former (Title II) are (italics and capitals supplied):

> "SEC. 3. A search warrant cannot be issued but *upon probable cause supported by affidavit*, naming or describing the person and particularly describing the property and the place to be searched.
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> "SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, *and require their affidavits or take their depositions in writing* and cause them to be subscribed by the parties making them.
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> "SEC. 5. *The affidavits or depositions must set for the FACTS tending to establish the grounds of the application or probable cause for believing that they exist.*

While this Court has not had occasion to construe this statute with reference to the precise questions now raised, nor to pass upon them directly in its consideration of the previous state of the law, of which the statute is

largely declaratory, the statute itself is reasonably clear, we respectfully submit, as to the propositions we have outlined above. Moreover, its construction has engaged the attention of several other federal courts, below this, the views of which are persuasive especially as they will be found, almost without exception, entirely consistent, on these points.

Among these is the logical and forcible opinion of the Circuit Court of Appeals for the Seventh Circuit handed down in directing the quashing of a search warrant and for reversal of the order for its issuance, to which the objection made was the insufficiency of the proofs on which it had been issued. That Court there said (italics supplied):

> "This limitation (the Fourth Amendment to the Constitution) was clearly observed in the Act in question (National Prohibition Act). No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not rumor, suspicion, or guesswork. If the facts, afford the legal basis for the search warrant, the accused must take the conseqeunces. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. *Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.*" And further that
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> "We thoroughly agree with the learned District Judge that the shield of the Constitution does not protect property that has been used in the commission of a felony, and that such outlaw property

> is subject to seizure by search warrant under this statute. But we find that the Constitution and this statute forbid a search warrant unless the issuing magistrate shall *first properly draw the necessary legal conclusion from facts duly presented to him under the oath of the accuser.* And in the record now before us we find no such presentation of facts.
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> *Veeder* vs. *United States,* 252 Fed. 414, 418, 419, 420.

An application for a writ of *certiorari* was denied by this Court.

> *Veeder* vs. *United States,* 246 U. S. 675.

The views expressed in that case have been approved by the Circuit Court of Appeals for the Fifth Circuit in *Pressley* vs. *U. S.* 289 Fed. 477.

Not less forcibly, the Circuit Court of Appeals for the First Circuit, reversing a conviction under the National Prohibition Act because of the use in evidence of liquor found to have been illegally seized, has said (italics supplied):

> "The provisions in sections 3-6 are *declaratory of the most carefully guarded previous judicial determinations of the meaning and scope of the Fourth Amendment of the Constitution of the United States,* and of similar provisions in state Constitutions. It need hardly be pointed out that a process issuing to an administrative official, which will authorize him at any time of the day or night to enter the home or office of any person, breaking doors, windows and opening by force anything within the premises, for the purpose of taking possession of articles belonging either to the occupant or falling within the category of outlawed property, is a power capable of such oppressive and liberty destroying use that it should be strictly guarded and exercised. In 1 Archbold's Criminal Practice and Pleading, p. 131, it is said:

> 'The proceedings upon search warrants should be strictly legal, for there is not a description of process known to the law, the execution of which is more distressing to the citizen. Perhaps there is none which excites such intense feeling in consequence of its humiliating and degrading effects.'
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> See, also the language of Lord Camden in *Entick* vs. *Carrington,* 19 Howell's State Trials, 1030, 1066;
> *Boyd* vs. *United States,* 116 U. S. 616, 622, 626, 6 Sup. Ct. 524, 29 L. Ed. 746, et seq."

And the court illuminatingly referred to the facts there involved, as follows (italics supplied):

> "No lawyer would have suggested and no judge would have permitted, Lordan, testifying as a witness before a jury, to say that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquor at his drug store. *He would have been requred to state what he saw, or heard, or smelled, or tasted; that is, to give evidence on which the jury under instructions of the court could determine* both as to the possession of liquor, as to whether it was intoxicating liquor, and as to whether possession of it was legal or illegal. *The fact that Lordan's affidavit was not, in form, on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of facts.* It is not enough that the form of this affidavit leaves it possible that the affiant MIGHT have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusions from the facts, should have been before the commissioner. Such is the plain requirement of section 5, *supra.*"

"Lordan's affidavit was, in its avoidance of a statement of facts for the judicial consideration of the commissioner, exactly adapated to create such a situation as was shown at the trial to exist in the case at bar. In fact, as Lordan testified at the trial, he had not been in Giles' drug store for three or four months. He knew nothing about the possession, legal or illegal, by Giles of intoxicating liquor, except as he heard rumors, or as complaints were made to him by one or more unnamed persons. That in this case these rumors appeared to have had some foundation is, for present purposes immaterial. *Our law does not contemplate that homes and business premises shall be thus invaded, unless and until some person takes the responsibility of disclosing under oath to a judicial tribunal facts from which such tribunal—not the applicant or affiant—finds probable cause to believe articles* particularly described, and properly seizable on search warrant, are in a place, also particularly described. In this case, as no facts whatever were put before the commissioner, he was ousted from his judicial function, and remitted to a performance purely perfunctory. The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer serving the writ. This is a very dangerous amalgamation of powers."

Giles vs. *United States*, 284 Fed., 208, 212, 214.

The same court said later in applying the rule which had then recently been laid down here regarding the use in evidence of things illegally seized:

"It is the plain duty of all United States commissioners carefully to study the search warrant provisions of the Espionage Act, and to exercise scrupulous care that all proceedings before them and processes issued by them conform strictly to the provisions of this statute. Failing such study and care, the already superabundant difficulties

> met in enforcing prohibition will be unnecessarily increased, and the courts will be compelled to deal with close and difficult questions that, under proper procedure, would not arise at all, and many plainly guilty offenders will escape. We must enforce the Fourth and Fifth Amendments and statutes intended to protect rights thus guaranteed, as faithfully as we enforce the Eighteenth Amendment and the National Prohibition."
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> *Murby* vs. *United States*, 293 Fed., 850, 851.

In the Circuit Court of Appeals for the Second Circuit, which declined in its opinion on review of an order for the production of papers, to pass upon the merits (finding the order not appealable), Circuit Judge Manton in a dissenting opinion discusses the affidavits on which the order was made and finds them insufficient and the search and seizure a violation of the Fourth Amendment. The affidavits while alleging the commission of the offense charged, and one of them that affiant was so informed by various persons, were found in his opinion not up to the requirements of the statute and of the Fourth Amendment; he says:

> "To obtain a warrant under this provision of the Espionage Act, under which this proceeding was instituted, there must be some satisfactory legal proof; that there is probable cause to believe that a crime has been committed; that the books and papers to be taken were means or instruments through which the crime was committed; and that the books and papers were concealed." And further
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> "Under the provision of the Espionage Act, and under the settled rules of law as laid down by the Supreme Court (*Boyd* vs. *United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Weeks* vs. *United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177), search warrants can only be issued where the facts are set forth under oath, and not upon suspicions,

surmises, or innuendoes. The facts must be stated, which, when the law is properly applied to them, at least tend to establish the necessary legal conclusion that there is probable cause for believing that the crime has been committed. Whether entry shall be made into the home of the accused or the business place of the corporation must be determined by the facts set forth in the affidavit, and not by mere rumor or hearsay or suspicion. Indeed, the legal conclusion of probable cause is not for the affiant, but is a duty delegated to the judge who issues the warrant; and he can only draw such a conclusion upon sworn statements of fact. The Constitution does not protect petitioner's property that has been used in the commission of a felony, and it does not permit the seizure of its books and papers which were not used as a means of committing a felony. The latter class of papers are immune from seizure; therefore the necessity of a proper description of the papers, and a plain statement of fact that the papers seized were used in the commission of a felony. Therefore the necessity of reliable statements of fact to aid the judicial officer in reaching the conclusion as to probable cause. There must be some positive statement which subjects the affiant to the charge of perjury if he falsely swears in his affidavit. *Veeder* vs. *United States, supra.* An application of these rules of law to the affidavits upon which this search warrant was issued, demonstrates its invalidity, and that it was improperly issued and should have been vacated by the District Judge."

Coastwise Lumber & Supply Co. vs. *U. S.*
259 Fed., 847, 849, 851-2, 852-3.

The Circuit Court of Appeals for the Fourth Circuit, reversing a conviction for violating the Harrison Anti-Narcotic Drug Act, in a case in which a search warrant had been issued upon an affidavit to the effect that the officer making it "has good reason to believe and does believe" that the offense had been committed, touched

upon these points so far as they were there involved and held the warrant invalid.

Woods vs. *U. S.*, 279 Fed., 706, 710.

In a case very recently reported in the Circuit Court of Appeals for the Ninth Circuit, on a conviction for "possessing, transporting and selling intoxicating liquor for beverage purposes," it appears that a search warrant had been issued upon the affidavit of a federal prohibition agent asserting directly that the defendants were committing that offense. In reversing the judgment, the court thus expressed its agreement with the declaration in *Giles* vs. *U. S., supra* (italics supplied):

> "It is fundamental that under Section 5 of the Espionage Act, 40 Stat., 228 (Comp. St. 1918, Comp. St. Ann. Supp., 1919, §10112c), before a judicial officer is authorized to issue a search warrant, he must have before him, by affidavit or deposition, the facts tending to establish the grounds of the application, or probable cause for believing that the facts exist. Tested by this requirement, the affidavit under consideration is fatally defective. It lacks any statement of an *evidentiary fact* tending to show that the defendants illegally possessed intoxicating liquor, or were transporting or selling liquor. *Not a circumstance is set forth tending to show that affiant had any knowledge to support his conclusion.* When th validity of such an affidavit was before the Circuit Court of Appeals for the First Circuit (*Giles* vs. *United States*, 284 Fed., 208, 214), the court said: 'It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. *It should have affirmatively apeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion* from the *facts*, should have been before the commissioner.'

Tynan vs. *United States* (C. C. A.), 297 F., 179; *Woods* vs. *United States* (C. C. A.), 279 F., 706. With that view we agree."

Lochnane, et al., vs. *U. S.*, 2 F. (2d), 427 (Adv. Sheets, Feb. 5, 1925);

The decisions in the following District Court cases will be found to the same effect.

Tri-State Coal & Coke Co., 253 Fed., 605 (W. D. Pa.);

U. S. vs. *Michalski*, 265 Fed., 839 (W. D. Pa.);

U. S. vs. *Maresca*, 266 Fed., 713 (S. D. N. Y.), (Petition for certirorari denied without opinion, 257 U. S., 657);

U. S. vs. *Pittoto*, 267 Fed., 603 (Ore.);

U. S. vs. *Borkowski*, 268 Fed., 408 (S. D. Ohio);

U. S. vs. *Kelih*, 272 Fed., 484 (S. D. Ill.);

U. S. vs. *Ray and Schultz*, 275 Fed., 1004 (E. D. Mich.);

Central Consumers Co. vs. *James*, 278 Fed., 249 (W. D. Ky.);

U. S. vs. *Jajeswieg*, 285 Fed., 789 (Mass.);

U. S. vs. *Descy*, 284 Fed., 724 (R. I.);

U. S. vs. *Casino*, 286 Fed., 976 (S. D. N. Y.);

U. S. vs. *Kaplan*, 286 Fed., 963 (S. D. Ga.);

Lipschutz vs. *Davis*, 288 Fed., 974 (E. D. Pa.);

Atlantic vs. *McClure*, 288 Fed., 982 (E. D. Pa.);

U. S. vs. *Fellig*, 288 Fed., 939 (W. D. Pa.);

U. S. vs. *Dziadus*, 289 Fed., 837 (N. D. W. Va.);

U. S. vs. *Harnish*, 289 Fed., 256 (Conn.);

U. S. vs. *Carlson*, 292 Fed., 463 (W. D. Wash.);

U. S. vs. *Palma*, 295 Fed., 149 (Mass.);
U. S. vs. *Lai Chew*, 298 Fed., 652 (N. D. Cal. 1st Div.);
U. S. vs. *Deloic*, 2 Fed., 2nd 377 (Adv. Sheets January 29, 1925, W. D. Wash.).

In *United States* vs. *Casino, supra*, it was said in the opinion by Judge Learned Hand (by whom the writ of error in this case was ordered):

> "While under Section 16 he must decide after hearing whether on all the facts there were reasonable grounds for the warrant, that does not dispense with the necessity for allegations in the affidavits themselves, which if true, show a self-subsisting ground for the issuance of the warrant. It is not enough that on the hearing other grounds may appear, even though not upon evidence extracted by the search itself. The showing for the issue must be enough to stand alone, and must be proved upon the hearing, if challenged. It will not do to abandon the "reasonable cause" first asserted, and support the search upon a new charge. In this respect the affidavits are like pleadings. Other corroborative evidence, no doubt, is admissible for the United States, but the original allegations must in the end be supported. *Hence, if those allegations on their face be inadequate, the warrant can by no possibility be legal. The Constitution means, and section 5 of Title XI of the Espionage Act contemplates, that the grounds of issuance shall be disclosed at the time of issue.*"

Very few decisions will be found in conflict with those we have cited. The only case we find which might be regarded as an exception of importance is *United States* vs. *Bookbinder* (278 Fed., 216, 281 Fed., 206, 207, 287 Fed., 790,—Circuit Court of Appeals for Third Circuit —application for *certiorari* denied 262 U. S. 748), in which denial of a motion to quash a search warrant was affirmed, the opinion says.

> "keeping clearly in mind the distinction between a seizure as here, of smuggled goods and a seizure of liquors believed to be in stock for the purpose of illicit sale" (287 Fed., 796),

and it was said by Judge Dickinson in the opinion of the District Court, which was expressly approved on review, of those two kinds of seizures:

> "The basic occasion for the seizure is wholly different. One is the fact of smuggling; the other is the fact of the commission of a crime. The seizure in the one case is justified by the fact that the goods were smuggled goods, irrespective of the guilt of the persons in whose possession they are found. A close analogue in some respects is a seizure in replevin or attachment procedings. In other words, the proceeding partakes somewhat of the character of a proceeding in rem. In the other case the seizure is justified only by the guilt of the person in possession. In other words, if this warrant had issued under the laws, the purpose of which is to punish those who make illicit sales of intoxicating liquors, it might well be held, both upon principle and under the authority of the cited cases, which are pertinent, that the warrant in this case issued improvidently."
>
> (278 Fed., 219).

It will be observed therefore that the case simpy determines that R. S. Sec. 3082 was not repealed by the National Prohibition Act and that a search warrant issued for smuggled intoxicating liquor, which that section declares forfeited, is not governed by the provisions of the Espionage Act, and points out why what would be unreasonable if applied to a search warrant under the National Prohibition Act while it is reasonable in the case of the search warrant there in question.

To deny that the requisites for searches may not vary under the Fourth Amendment, without inconsistency in principle, with such variation, as is pointed out in that

case, in the fundamental conditions, would, it seems to us, be manifestly shallow and artificial construction. And see *Amos* vs. *U. S., supra.*
And see

Amos vs. *United States*, 255 U. S. 313.

In the still more recent case of *Carroll* vs. *United States*, 45 Sup. Ct. Rep. 280, Adv. Sheets, April 1, 1925, as your Honors will of course recall, the opinion of the Court handed down by your Honor, the Chief Justice, holding a seizure of an automobile and liquor in it and the arrest of those driving it authorized under the circumstances, without a warrant, is based on the construction of Sec. 26 of Title II of the National Prohibition Act, which does not require conformity with the provisions made in the Espionage Act for the issuance of search warrants, as does Sec. 25, under which the warrant here in question, and observes (at page 285):

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is nt practicable t osecure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

This case seems to us, therefore, in no sense inconsistent with our position, and that is given strong support, which, so far as a warrant of this kind is concerned, is quite in keeping with the opinion of the court, in the dissenting opinion handed down by your Honor, Mr. Justee McReynolds, who said (at page 292):

"The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed."

D.

On the general subject of search and seizure, this Court has, as will of course be recalled, most unmistakably laid down the law of the Nation, and just as it has recently dealt "in the spirit of these decisions," with the question of the admissibility in evidence of things illegally seized, so it will now deal in the same spirit, we assume, with the different phase of the same subject involved here. Some of those decisions which we need not cite separately though we rely strongly on them, are mentioned in the following forcible declarations recently handed down from this bench:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* vs. *United States*, 116 U. S. 616 * * *, in *Weeks* vs. *United States*, 232 U. S. * * * and in *Silverthorne Lumber Co.* vs. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty and private property"; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual de-

preciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.

In the spirit of these decisions we must deal with the questions before us."

Gouled vs. *U. S.*, 255 U. S., 298, 303, 304.

That the National Prohibition Act was enacted by Congress in that spirit is clear not only from the terms of the Act itself, but is confirmed, if confirmation were necessary, by remarks made by the sponsor for the Acts in the House of Representatives on the provisions here in question. Mr. Volstead said on July 19, 1919:

"we purposely took out of the search-warrant provision of that Act, except as against persons who might be disloyal, every tooth that we could because we were opposed to the granting of any broad general power to search anybody, except they were disloyal. If anybody gets a warrant not in good faith, he is subject to severe punishment. If the officer executing it exceeds the power given in the warrant, he can also be punished. In every way it is sought to be guarded. No justice of the peace can issue it. No one but a court of record or a United States commissioner can grant one.

"In every State I believe you can get a search warrant from a justice of the peace, and can get it by simply swearing to a complaint. You cannot get anything of that kind under this bill. You have got to go before a court and subject yourself to an examination before a judge or the commissioner will give you a search warrant."

(Congressional Record, Vol. 58, Sixty-fifth Congress, page 3047).

Mr. Volstead was in error regarding the practice in the States, at least the State of New York, from which as has been poited out in *U. S.* vs. *Maresca, supra*, the pro-

visions of the Espionage Act regarding search warrents were practically taken.

> *People ex rel. Simpson* vs. *Kempner,* 208 N. Y., 16.

In the Federal courts it has been several times remarked that they were in substance but declaratory of the law previously in force, and we understand that by weight of authority, that is the case as to search warrants properly falling in this class. See:

> *United States* vs. *Tureaud,* 20 Fed., 621;
> *United States* vs. *Yuck Kee,* 281 Fed., 228;
> *Re Rule of Court,* 3 Woods, 502 F. C., No. 12, 126:
> *U. S.* vs. *Kelly,* 227 Fed., 485, 488;
> *U. S.* vs. *Three Tons of Coal,* 6 Biss., 379, F. C., No. 16515;
> 24 Opinions of Attorney General, 685, 688;
> *Cooley, Const. Limitations,* 7th Ed., 247, 431, 434.

But it is unnecessary we assume to go into that, for even if any of the requirements here particularly in question may have been at times disregarded, even by some of the courts, before Congress spoke or this Court has spoken, that circumstance cannot, it seems to us, limit the rights the plaintiffs-in-error are clearly given by the statute under consideration.

E.

The application of these propositions to the case at bar will result in clarifying the situation by demolishing certain of the fortifications which the opinion below placed around the warrant.

First.—By virtue of proposition A and C above, we

must disregard the general allegation in the affidavit that the winery was the source of supply of wine for the grocery, on which, it seems clear, from the manner in which it is referred to in the opinion (fol. 102), that the learned Judge below based his decision in part. The lack of probatine force, from the legal point of view, in that assertion, is apparent from the sound reasoning used in *Giles* vs. *United States*, *Lochnane* vs. *United States*, and other cases *supra*. Whether an allegation on information and belief will stand at all in such a case, as we think that possibly it might under *Beavers* vs. *Henkel*, 194 U. S. 73, if the names of affiant's informants —in this case "other agents"—and other particulars and sources properly set up, such an allegation, when couched as this is, in terms which would be fully satisfied by the two purchases he alleges elsewhere in the affidavit, and render proof of those purchases a complete practical defense to the affiant against a charge of perjury on this general allegation, surely add nothing of probatine value to those specific allegations, which we do not question are effective against the grocery, but of course cannot be against the winery without proper proof of some connection between them.

Second.—Also condemned by propositions A and C is the assertion that "In the absence of proof, to the contrary, it is reasonable to suppose that it (the wine found in the grocery) case from the winery" (fol. 105)—as though the 74 bottles found there could not quite as probably come from the premises on the other side of the grocery or from any other place—which, we submit, is clearly such a mere surmise as the statute manifestly intended should not be made the basis for a warrant. It is true that plaintiff's-in-error made no explanation as to how the wine in the grocery came there, but why should they be expected to do that? They did not own nor conduct the grocery, and were not alleged to be, and were not, in position to account for its conduct.

THIRD.—The same thing may be said of the finding, which is implied in the opinion, that the fact that the son of Mrs. Dumbra obtained wine by going to the rear of the grocery behind the partition, and turning toward the winery, was proof in some degree, that the wine was from the winery, especially in the absence of any allegation that there was an opening between the two places, or some other means of communication between them, behind the partition.

FOURTH.—Proposition B also directly excludes as possible justification for the issuance of the warrant, the statement—the truth of which was not and is not questioned—that 74 bottles of wine were found on execution of the warrant, in the grocery, the only allegations in the affidavit as to what quantity of wine was possessed in the grocery being the specific allegations regarding the purchase of three bottles.

FIFTH.—Proposition B also directly excludes the assertion that Mrs. Dumbra and her son, whom the complainant met at the grocery of undisclosed ownership, were respectively the wife and son of the plaintiff-in-error Domenico Dumbra (fol. 104), for if that was the fact,—which we did not and do not concede,—the learned Judge must have learned at from some source other than that prescribed, the affidavit, which, as has been noted, does not allege it. It is true as the opinion says that such relationship was not denied, but why should it be denied in the absence of any affirmative allegation on that point, and thus unnecessarily open upon a controversy of many possible—and we may add in this case, actual—complications. Moreover the mere fact of such relationship would not have been material, even if the court had had the right from the affidavit to regard it as a fact, for that would raise no implication, especially in a criminal transaction of that kind, that she was acting as the agent of

her husband or with his knowledge, and, as has been said, no attempt was made otherwise to show such knowledge (See 21 Cyc., 1236-7).

SIXTH.—With those findings, must also fall the finding that as a matter of fact the wine in the grocery was replenished from the winery, which was obviously based largely on the surmises, assumptions and forceless assertions we have just considered. The question of burden of proof also possibly in some degree here involved will be considered at Point III.

So little in the way of fact remains for consideration after these foundations of the order under review are removed, that it may not be out of place for us to obserce here in passing that we have no doubt that the learned District Judge would not have denied the motion but for his misapprenhension of the facts in the pressure of his arduous duties.

POINT II.

The special proof required for the charge of illegal possession against permitees.

A. ONE ELEMENT OF SUCH A CHARGE, HERE MADE, UNLIKE THE CHARGE OF ILLEGAL SELLING OR TRANSPORTING, IS AN INTENT NOT NECESSARILY INFERRABLE FROM A FEW SALES, SINCE IT MUST EXTEND TO THE STOCK OF LIQUOR IN POSSESSION AS A WHOLE.

B. THE EVIDENTIARY FACTS ON WHICH THE WARRANT HERE WAS BASED ENTIRELY FAIL TO SHOW PROBABLE CAUSE FOR BELIEVING THAT PLAINTIFFS-IN-ERROR ENTERTAINED SUCH AN INTENT.

C. PERMITTEES, UNLIKE OTHERS, DO NOT HAVE THE BURDEN OF SHOWING THAT THEIR POSSESSION OF INTOXICATING LIQUOR IS LAWFUL, AND NO PARTIES MOVING AGAINST SEARCH WARRANTS HAVE THE OTHER BURDENS THE LEARNED DISTRICT JUDGE SUGGESTS.

We invite attention here to the fact that the offense specified above was the charge on which the warrant was issued here, though of course that was not the nature of the offense laid in the joint and undifferentiated charge against the grocery, which, presumably and so far as appears did not, and reasonably and naturally would not have a permit.

It is true that the permit itself was not before the court until the motion, but it was not negatived, and when application was made for the warrant, the court was reasonably placed on inquiry by the reference to the premises of plaintiffs-in-error as a "winery." If a winery did not have a permit, why did not affiant allege that fact, which could have been readily ascertained from the records of the Treasury Department of which he describes himself as an employee? And, obviously, the court was fairly apprised that he understood that he was charging a permitted winery, by his allegation, coupled with the entire failure to deny the existence of a permit, that the purchases he alleges were made without his exhibiting or being asked to exhibit a sacramental permit, which would of course have been without significance but for the permit. It will be observed that while the opinion fails, we think, to take adequately into account the logical effect of the permit, it does not suggest and the decision is not based on ignorance of that unquestioned fact, in the mind of the court, either at the time of the decision or at the time of the issuance of the warrant.

A.

Sec. 25, Title II of the National Prohibition thus defines what may be seized under it:

> "SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been used." (41 Stat., 315).

The stock of wine, of which the fifty barrels seized and removed, were apart, could not have been "so used" by plaintiffs-in-error, up to that time, from which it follows of course that if their possession was illegal, it must have been because their stock was by them "intended for use in violating this title."

The law on this point,—about which it seems to us there can be no real question—has been developed substantially in accordance with our statement above in several cases in the District Court, and while the applications of the law have resulted variously we find agreement in the main on the point of law itself, except that some of them state it even more srongly in favor of the permittee. Among these cases are:

Francis Drug Co. vs. *Potter,* 275 Fed., 615 (Mass.);

Central Consumers Co. vs. *James,* 278 Fed., 254 (W. D. Ky.);

In re Alpern, 280 Fed., 432 (W. D. N. Y.);

Matter of Search Warrant, 15 E. Third Street, 284 Fed., 914 (S. D. N. Y.);

United States vs. *Casino,* 286 Fed., 976 (S. D. N. Y.);

Lipschutz vs. *Quigley,* 287 Fed., 395 (E. D. Pa.);

Lipschutz vs. *Davis,* 288 Fed., 974 (E. D. Pa.);

Friedman vs. *Yewllowley,* 290 Fed., 248 (E. D. N. Y.);

Mellet and Nighter Brewing Co. vs. *U. S.*, 296 Fed., (E. D. Pa.);

and see

Shreveport Drug Co. vs. *Jackson*, 2 Fed., 2nd 65 (adv. Sheets Jan. 8, 1925),

and as we read the opinion of Judge Knox in this case, he enteretained no different view of the nature of the offense charged, his error consistng rather, we maintain, in viewing the facts which were presented to him as sufficiently showing probable cause to believe plaintiffs or their stock of wine guilty of the offense we have described, including this element of intent on plaintiff's part to make unlawful disposition of their whole stock of wine.

B.

The only evidentiary facts from which such intent could properly have been inferred, if inferred at all, were simply the two purchases.

The one first alleged which occurred on February 12th, had no connection at all with the winery, so far as it competently even suggested. It was arranged and consummated at the grocery and the wine was obtained from somewhere "behind the partition" in that store.

The other presents the one, solitary scintilla of proof that any wine illegally used might have come from the winery, but suggests also that it might have come from the grocery, which the allegation regarding the other purchase indicated was selling wine illegally, while there is nothing to indicate that the winery was. The son, after affiant had arranged with him at the grocery for the purchase of the wine, went back into the grocery and later came out of the winery with the bottle of wine wrapped in a paper bag. Did he obtain the wine in winery, or in the grocery, where by fair presumption he obtained the wine on the occasion of the other purchase, and obtain

the bag in the winery, or in the grocery, or one or both from some private cache of his own in neither? One of those guesses is, we submit, as good as any other, and clearly, under such circumstances, any one of the answers can be but a guess.

But if we take the bull by the horns and assume that those allegations afford probable cause to believe that he obtained that bottle of wine from the winery, which so far as appears was not even affiant's belief, the all important question remains, did he do that by authority of the proprietors of the winery, or to provide himself with a few dollars spending money in their absence? Is it to be presumed out of whole cloth that they placed a large and valuable business in jeopardy by countenancing such conduct on his part?

And that is not the last hurdle the learned District Judge had to make in order to issue the warrant on this one last small fact, which though possibly competent, is without any real cogency as proof of the requisite intent, for a sale of a single bottle from a large stock, even if it was made from that stock and even if it was made by authority of the owners, falls far short logically of establishing the probability that they intended the stock as a whole for illegal sales. None of the courts which have dealt with the question have suggested that such an intent could be shown by a single sale, unless it were accompanied by other incriminating circumstances, here entirely absent, and some of those cited above have pronounced emphatically against it.

Lord Cambon in *Entrick* vs. *Herrington*, *supra*, traced the search warrant, which was unknown to the early common law, to the Star Chamber. If its issuance in such a case as this, may still be justified, at caprice, by such a fluttering bit of possible proof as is left in this case, then even after the purging of the Fourth Amendment and of Congress in the Espionage Act and of this Court and other courts in many stirring declarations, it remains in

substance much as it was when opposition to it became the "child of independence" in the days of the founders.

C.

It may be urged that the Government's case was saved by the law as to the burden of proof, though the opinion did not take that position.

The provision regarding the burden of proof which is peculiar to the National Prohibition Act is found in the following section of title II, and is:

> "Sec. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title * * * and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used" (41 Stat. 317).

It is true that some of the district courts have held the concluding sentence applicable to a permittee moving against a search warrant (among them the District Court for the Eastern District of New York in *Seldon* vs. *Lee*, 3 Fed., 2nd, 335, citing other cases), but that would have the practical result of making the search warrant effective, no matter how repugnent its issuance might be to the Fourth Amendment.

That the search warrant unlawfully issued, though it is to stand, may be gotten rid of by trying out the issue, as some of those courts have suggested, manifestly fails, it seems to us, to satisfy the Constitutional inhibition that

> "no warrants *shall issue*, but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized" (41 Stat. 317).

Other courts, proceeding more carefully, we think, have held that construed properly in the light of the Constitution, the word "action" in the last sentence does not include the more summary application by motion to quash, and on a broader view of the Act, and a better conformity to such pronouncements in regard to the Fourth Amendment as we have cited at Point I D, we respectfully submit that the latter is the sounder view. Among the recent cases in which that view will be found very ably presented are:

United States vs. *Desoy*, 284 Fed., 724;
In Re Crescent Beverage Co., 297 Fed., 1009, and cases there cited.

The statute is manifestly in derogation of the common law and the Circuit Court of Appeals for the Third Circuit has recently held it not applicable to a criminal action for conspiracy to possess and transport intoxicating liquor in violation of the National Prohibition Act, for the reason that that offense is not the same as the offenses of possessing or transporting, though in the servilely literal sense the action for conspiracy would seem to be "an action concerning the same" (illegal possession) referred to in the statute.

Linden vs. *U. S.*, 2 Fed. 2nd 817 (Adv. Sheets, Feb. 26, 1925)

Regarding the burdens resting on the plaintiffs-in-error, or the inferences to be drawn from their failure to affirmatively establish facts, in other respects, which are matters of the general law of evidence, we wish to say, first and particularly as to the hearing suggested in the opinion (fol. 106) under Section. 15 of the Espion-

age Act, that plaintiffs-in-error in moving below to quash the warrant, relied as we still maintain that they had the right to do, on the insufficiency of the affidavit on which the warrant was issued. We believe that in that way they would have secured their rights much more expeditiously, cheaply and simply, than by trying out the charge, and quite as effectively, if a review had not been necessary (as, of course, might have been the case if they had proceeded in any other way). The hearing under Sec. 15 is provided clearly for the vacation of a warrant granted upon the presentation of facts constituting a valid *prima facie case*—which was not the case here—and it is desired to answer or disprove those facts—which was not thought necessary here. The taking of that position by plaintiffs-in-error should not have been regarded as in any way strengthening the basis on which the warrant had been issued.

The view of the learned District Judge that plaintiffs-in-error should have shown how the wine came into the grocery, and negative its coming from the winery, under pain of being subjected to the "necessary inferences" that it did, could be justified only, according to familiar principles of law, by an antecedent *prima facie* showing of probable cause, which we believe we have shown had not been made, and the assumption that it had been was based upon a misapprehension as to what had been actually shown, as we have also pointed out; so that the failure of plaintiffs-in-error to negative the court's unauthorized inferences adds nothing to the strength of the showing of probable cause the Government was obliged to make affirmatively against them.

POINT III.

The return of the wine seized

A. Should have been ordered below

B. Should be directed here on obtaining of special permit.

Having made it clear, as we believe, that the search warrant was invalid because it was not based on a sufficient showing of facts, the questions stated above call for answer.

A.

Some of the circuit courts of appeals and district courts, on quashing a search warrant, have ordered the return of liquor seized under it, as a matter of course.

Veeder vs. *U. S., supra;*
Giles vs. *U. S., supra;*
Honeycutt vs. *U. S.*, 277 Fed., 939 (C. C. A., 4th Cir.);
Margie vs. *Potter*, 291 Fed., 285 (D. C. Mass.)

Others have declined to do so, where it had appeared that it was held for illegal use, even though the seizure was unlawful.

U. S. vs. *Rykowski*, 267 Fed., 866;
Haywood vs. *U. S.*, 268 Fed., 795;
U. S. vs. *O'Dowd*, 273 Fed., 600.

In *Voorhies* vs. *U. S.*, 299 Fed., 275, the Circuit Court of Appeals for the Fifth Circuit apparently goes so far as to impose upon the claimant the burden of proving himself entitled to the return of the seized articles,—in that case he did not allege that he was the owner,—

but in that position it goes beyond the Circuit Court of Appeals for the Seventh Circuit, the decision in which in *Haywood* vs. *United States, supra,* which is cited as holding that, being rather to the effect that the return would not be made where the illegality of claimant's possession had been made to appear. In the latter case, which was a criminal action for conspiracy on several counts, including violation of the Espionage Act, the existence of probable cause against the defendants was held to have been shown. The Court said:

> "Common to the case under counts 3 and 4 are assignments on rulings made prior to the trial. On September 5, 1917, agents of the Department of Justice raided the offices of the I. W. W. in various cities and seized their files of correspondence, together with copies of newspapers and pamphlets. The greater part was taken in Chicago from the general headquarters in charge of Haywood. The affidavits, on which the search warrants issued, failed to describe the property to be taken except by reference to its general character, and failed to state any facts from which the magistrates could determine the existence of probable cause. If the proper parties had made prompt application, it may be assumed that they would have obtained orders quashing the writs and restoring the property. *Veeder* vs. *United States*, 252 Fed., 414, 164 C. C. A., 338. If, following restoration, Haywood and others were adjudged to be in contempt for refusing to obey subpoenas and orders of court to produce the files and documents before the grand jury, it may be assumed that such judgments would be reversed. *Silberthorne Lumber Co.* vs. *United States*, 251 U. S., 385, 40 Sup. Ct., 182, 64 L. Ed., 319. Nothing of the sort occurred. Government attorneys, without objection or hindrance, used the property as evidence before the grand jury. Indictment was returned on September 28, 1917. In February, 1918, defendants petitioned the court for an order to return the property, and the government moved for an impounding order. In March, 1918,

> defendants moved to quash the indictment on the ground that evidence illegally obtained had been used before the grand jury. From defendants' verified motions to return the property and to quash the indictment, from the government's verified motion to impound, and from the property then in court, there was a sufficient basis of facts to justify the trial judge in finding that there was probable cause to believe that the property, particularly identified, had been used in the commission of the felonies described in counts 3 and 4. Motions to return the property and to quash the indictment were overruled, and the motion to impound was sustained. The trial lasted from the middle of April to the middle of August, 1918. Repeatedly during the trial the defendants objected and excepted to the admission of such property in evidence."

It will be noted that the admission in evidence of the seized property, there held proper, is at variance with the subsequent decision of this Court in *Gouled* vs. *United States* on that point, and the determination this Court may make on the right to return, will it seems to us fair to assume, if made in the same spirit, establish at least that the claimant is not subject to the burden of affirmatively showing his innocence, on a proper application for return of things which have been seized from him illegally, for of what substantial use is immunity from unreasonable search and seizure, if things unreasonably seized may not be recovered?

It was precisely on the theory maintained in the extreme cases on this point—that the Fourth Amendment was not concerned with the thing seized, after the seizure —that illegally seized articles which had not been returned before trial were held admissibe in evidence, until this Court settled the law to the contrary.

But even the extreme holding of such cases as *Voorhees* vs. *United States*, questionable as it seems to us, would not stand in the way of a return in the instant

case, unless it is to be unwarrantably extended still further against claimants; for plaintiffs-in-error here did show themselves the owners and entitled by permit to hold possession. Further, since the presumption against the lawfulness of the possession of intoxicating liquor is not made applicable by the statute to permittees, as has been pointed out, the rule that there is no property in intoxicating liquor unlawfully held, on which those cases are largely based, presumably does not apply; the plaintiffs-in-error stood, on their motion to quash and return, free from the peculiar implications imposed for some purposes by the National Prohibition Act, and therefore entitled to the presumption of innocence.

Their right to return could therefore be defeated, under the circumstances of this case, only by making it the rule, that the owner of liquor for the possession of which he had a permit from whom it has been seized on the charge that he intended to sell it unlawfully, but without showing probable cause to believe that that was his intent and therefore without showing probable cause to believe that the liquor was not property, cannot secure its return, even though he may have the search warrant quashed, without first meeting and disproving the charge on the merits. We do not understand that any of the holdings have gone to that length, and cannot suppose, in view of the various recent decisions of this court which we have cited, that this Court will deem it necessary to so extend it.

B.

The fact that the permit which plaintiffs-in-error had at the time of the seizure and of the motion is no longer in force, as pointed out at the end of the statement of the case, presents no serious difficulty, for while they would of course have held a permit from the Treasury Department for that purpose, provision for such "special permit" is made by that department's "Regulations

60," Sec. 240, the practice under which would make it practicable for them to obtain such a permit on filing the required bond.

POINT IV.

The person to whom the warrant was addressed was not authorized to serve it.

He was, as appears from the order (fol. 92):

> "An agent and employee of the United States appointed by the Commissioner of Internal Revenue, said appointment having been duly approved by the Secretary of the Treasury," and held no other office.

On this question both sides of which are supported by numerous decisions of the lower courts, the views we maintain are ably and fully presented in the opinion by Judge Woodbrough of the United States District Court for the Northern District of Nebraska, in

United States vs. *Musgrave*, 293 Fed., 203,

and by the dissenting opinion of Judge Anderson of the Circuit Court of Appeals for the First Circuit in

Keehn vs. *United States*, 300 Fed., 493, 499.

POINT V.

The case should be reviewed here.

A. The practice of moving against such search warrants is now authorized.

B. The order complained was final, not interlocutory in any action.

A.

As has been pointed out by Judge Hough in *United States* vs. *Maresca*, 266 Fed., 714, 722, the early method of reviewing the issuance of search warrants was by action of trespass, but the National Prohibition Act, in Sec. 25 of Title II (40 Stat., 228), in which it provided for their issuance also made special provision for the disposition of the things to be seized under it, in part as follows:

> "Such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof";

and further that

> "The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process,"

and with the increase following the Espionage Act, and the still greater increase following the National Prohibition Act in the occasion or desire for prompt relief from search warrants authorized by those acts, the practice of moving to quash them, with or without suppression from use in evidence, and with or without return, as of course your Honors are fully aware, and the old action of trespass for such circumstances has become unusual if not absolute.

This practice is impliedly authorized, it seems to us,

by the part of the statute last quoted above, as a substitute for the older and more cumbersome and dilatory remedy, at least in the case of warrants issued under the National Prohibition Act, and in view of that provision such motions must be now recognized, we respectfully submit, as the or a proper method for determining rights to the return of things seized under such warrants.

B.

Orders quashing or declining to quash such warrants may, and no doubt ordinarily are and have been made in or incidental to some action, *but in this case, at the time of the order complained of, there was no criminal action pending on the charge made in the warrant;* for as pointed out in our statement of the case, the only criminal prosecution which had been started had been abandoned, and if a search warrant can properly be considered incidental to a libel, which on precedent we cannot concede, not only was there nothing to indicate that it was so intended in this case, but it was also shown that the only libel which had been filed was not against this wine, and that is still the situation.

That such a warrant is not necessarily incidental appears, we think, from the provisions authorizing it. That made by the National Prohibition Act, Title II, Sec. 25 (41 Stat. 315) is that

> "A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917."

and Sec. 1 of Title XI of that act (40 Stat. 228) provided:

> "A search warrant authorized by this title may be issued by a judge of a United States District Court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located."

Neither contains any provision that any action shall be started.

In *Coastwise Lumber Co.* vs. *United States,* 259 Fed. 847, at 849, the principal authorities are thus briefly but carefully reviewed by the Circuit Court of Appeals for the Second Circuit in the opinion by Judge Hough (italics supplied):

> "In the case of *Wise* vs. *Mills*, 220 U. S. 549, 31 Sup. Ct. 579, 55 L. Ed. 579, the District Court entered an order committing the United States attorney for contempt, because of his refusal to obey its order to return books and papers of the defendant in a criminal action seized without a warrant. Upon his writ of error the Supreme Court held that the order committing for contempt was final as to the United States attorney because, he not being a party to the criminal action, nothing more remained to be done as far as he was concerned, while it held the order to return the defendant's books and papers was interlocutory.
>
> "When one not a party to the action has been committed for contempt, the order is final and appealable as to him (*Nelson* vs. *United States*, 201 U. S., 92, 26 Sup. Ct., 258, 50 L. Ed., 663; *Alexander* vs. *United States*, 201 U. S., 117, 26 Sup. Ct., 356, 50 L. Ed., 686); and *when there is no action pending* a demand for a return of books and papers seized is of course an independent special proceeding (*Perlman* vs. *United States*, 247 U. S., 12, 38 Sup. Ct., 417, 62 L. Ed., 950; *Veeder* vs. *United States*, 252 Fed., 414, 164, C. C. A., 338)."

The finding from the circumstances in that case was that the warrant was incidental to a pending criminal action, and that the order was not final. how can that and the several other decisions like it apply when there was no action?

We appreciate that we are standing on comparatively new ground here, but we believe it sound, in view of the recent statutory changes referred to and the resulting or

accompanying changes in practice, and in view of the peculiar circumstances this case presents.

Furthermore our position is supported by *Veeder* vs. *United States, supra,* in which the Circuit Court of Appeals for the Seventh Circuit entertained a writ of error for the review of an order of apparently the same kind as the order in this case. Also we are strongly supported in principle by the decisions of this Court in the more or less analogous cases cited above, viz:

Wise vs. *Mills*, 220 U. S., 549;
Nelson vs. *United States*, 201 U. S., 92;
Alexander vs. *United States*, 201 U. S., 117;
Perlman vs. *United States*, 247 U. S., 12;
Veeder vs. *United States*, 246 U. S., 675.

We respectfully submit that there being no action, the plaintiffs-in-error here are in the same position as those who were allowed reviews in those cases.

It will be observed that the warrant was not issued in this case to secure evidence, but to reach the *corpus delicti* of a crime, and after the prosecution for the crime had ended, then logically that left the warrant standing alone (and should have insured its vacation and the return of the wine on the proof made of the right to receive it).

Finally, if this order cannot be reviewed, plaintiffs-in-error are deprived of their right in respect to unreasonable search and seizure, for they are expressly forbidden by the last part of Sec. 25 to bring replevin for the fifty barrels of wine, which it has been made clear, we respectfully submit, were taken from them unlawfully and unreasonably, and if they had proceeded under Sec. 15 of the Espionage Act, the order which would have been made would of course have been no less interlocutory and they would be confined for their remedy to an action of trespass against the prohibition agents—an ac-

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tion, which we trust, it may not be improper for us to add it would not be worth their while to bring.

POINT VI.

The order of District Judge Knox should be reversed and direction made that the fifty barrels of wine and containers which were seized on February 15, 1925, from the winery of plaintiffs-in-error be returned to them on their qualifying to receive it by obtaining a permit authorizing them to do so from the Secre- of the Treasury.

New York, April 13, 1925.

Respectfully submitted,

Charles Marvin

(CHARLES MARVIN,)

Attorney for Plaintiffs-in-Error.